Task Force on Labour Relations

Study No. 10

Unfair Labour Practices:
An Explanatory Study of the Efficacy of the Law of Unfair Labour Practices in Canada

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Ottawa

TASK FORCE ON LABOUR RELATIONS
(under the Privy Council Office)

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The studies of the Task Force on Labour Relations represent some of the research carried out under contract. The Task Force members do not necessarily agree with the observations and opinions expressed in these studies.

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CHAPTER I

INTRODUCTION AND EXPLANATION

A. TERMS OF REFERENCE: THE STUDIES

For our general guidance the following terms of reference were suggested by the Chairman of the Task Force: "To determine the efficacy of the law of unfair labour practices with respect to unionization, collective bargaining and the administration of collective agreements".

Our instructions were to ask the question "how well are the unfair labour practice provisions in Canadian provincial and federal labour relations legislation achieving the purposes for which they were enacted?" rather than to proceed by traditional methods of legal research. The premise of our work is, therefore, that the law of unfair labour practices in Canada, except for the most recent developments, is as expounded by Dean A.W.R. Carrothers in Collective Bargaining Law in Canada (1965), c. 10.

As suggested, our main efforts went into conducting a survey in Canada of informed opinion as to the efficacy of the unfair labour practice provisions in the various Canadian labour relations statutes. In this task we were ably assisted by H.A. Beresford, at that time newly graduated from Queen's Faculty of Law. Professor Gorsky conducted a similar survey on a limited scale in the United States in order to obtain a point of comparison. A subsidiary study was made of the reactions of employers and union officials

who, in the last twelve months, had been involved in proceedings under section 65 of The Labour Relations Act of Ontario. This follow-up study was conducted by M.F. Gordon, also then a new graduate of Queen's Law. His report is attached as Appendix C.

We wish to thank Mr. Beresford and Mr. Gordon for their diligence and also to express our gratitude to Mrs. Lynne Green who went well beyond the line of duty in assisting Mr. Beresford in the administration of our project as well as doing all our typing.

B. SURVEY OF INFORMED OPINION

In the course of our survey of informed opinion we interviewed, for the most part, lawyers active in labour relations. We also interviewed the chairman or other senior official of each of the labour relations boards in Canada. In Ontario, Quebec, New Brunswick, Saskatchewan and Alberta, we interviewed labour and management board nominees as well. We talked to some academic labour lawyers and some union representatives who appear as counsel before the labour relations boards.

Chapter II is the report of our opinion survey of informed people involved in the administration of unfair labour practices legislation in Canada. Under each sub-heading the relevant legislation in every Canadian jurisdiction is referred to and set out at the end of the chapter in the references. Having served the reader's convenience to that extent, we thereafter speak only in terms of the federal legislation, unless there is a significant variation in legislation or its effectiveness in particular provincial jurisdictions. The accumulated experience of the persons surveyed is, of course, much greater under the Ontario or British Columbia legislation than it is under the federal Act.

How good the present legislation is is a value judgment which, as we understand our terms of reference, we have not been asked to make. The Task Force itself performs this function. Our function, as we understand it, has been to assess the judgments that informed persons in Canada have made on that question. We have, however, been unable to resist forming our own opinions and include them in Chapter V of this study.

Because of the partisan commitment of participants in labour relations activity, it has proved very difficult to find a consensus of informed opinion on the efficacy of the unfair labour practices laws in Canada. This, of course, was expected. Where we found a consensus we have reported it, but very often we have had to be content to report a separate consensus among those committed to management, among those committed to labour and among those persons, generally in government or university work, who can claim to be uncommitted.

We are satisfied that we have interviewed a cross-section of the best informed people in the country about the operation of the unfair labour practice provisions in the various labour relations acts. Nevertheless, it soon became obvious to us that, except for some people in teaching or government, very few of the people interviewed had ever really thought out an answer to the question "How well do the unfair labour practice provisions work?" In most cases what we obtained was a subjective reaction to accumulated experience, often greatly coloured by the most recent experience. In the result, what we are reporting is <u>our</u> assessment of how efficacious the unfair labour practice provisions are considered to be by each of the groups interviewed. We have reported this assessment both generally and with regard to each prohibited practice.

Selection of Persons to be Interviewed

No attempt was made to place the selection of the people to be interviewed on a scientific basis. We did not have the time or resources to justify an attempt to evolve a scientifically valid method of selection and apply it. This survey was intended to be and is an exploratory study. We chose our sample on the basis of reputation known to us, on the basis of recommendation by people in whom we had some confidence, and on the basis of the willingness of the people approached to discuss unfair labour practices. We are frank to admit that such bases of selection mean that distorting factors must have crept in. We did, however, make an effort to see people who represented rather different shades of opinion and institutional backgrounds.

The major distortion, of course, in our sample group is that they were nearly all lawyers. We recognize that lawyers bring a peculiar approach, often an unduly narrow one, to their assessment of the efficacy of legal intervention in a field of complicated social relationships. We chose, nevertheless, to confine ourselves almost wholly to the legal profession because the limitations of time demanded that we work with some definable group. Whatever the shortcomings of the legal profession in an area like labour relations, there is a professional characteristic of objectivity that we hoped to take advantage of. In some cases we were well served by men who, in speaking to us as fellow members of the profession, were willing to discard completely the role of the advocate. Moreover, there is a considerable number of lawyers who are involved, for a very large part of their time, with labour law. They, more than anyone else, work with the application of the unfair labour practice provisions in a wide variety of

situations and they know how well the provisions work, albeit usually from the point of view of how well the provisions serve the ends they seek for their clients. There is, of course, an appreciable number of lawyers who have a keen and objective interest in law reform, in labour law no less than in other areas of the law. This interest was particularly marked among the highly specialized practitioners in Toronto.

The Questions Asked

A copy of our interview guide is included in Appendix A. The first questions set out there are general, planned to involve the person being interviewed and to allow the interviewer to assess the point of view of his subject. The more particular questions that follow relate to each of the four stages of the collective bargaining relationship: organization, recognition, negotiation, and the administration of the collective agreement. In connection with each of these stages we asked, first, a general question about each of the relevant unfair labour practices and then, if necessary, a series of more specific questions. The questions set out in the last part of the interview guide relate to matters that cut across the stages of the collective bargaining relationship.

The questions each serve to elicit at least one of the following: opinion on the efficacy of the legislation, facts about its application, legal opinion on its meaning and effect, and suggestions for reform. Suggestions for reform we thought to be not only useful in themselves but also indicative that some thought had been given to the efficacy of the existing legislation. While the question "what is the law?" is properly the subject of traditional legal research, we felt that widespread misunderstanding of the law or disagreement as to what the law is would in itself point to a lack of efficacy.

In the interview itself, our approach was to start with the general questions at the first of the guide and then to ask broad questions relating to a particular unfair labour practice, or several of them, leaving the interview open-ended thereafter. Many of the people interviewed answered the specific questions in the interview guide in the course of giving their answers to the broad questions. Where they failed to do so, and where time permitted, we asked the specific questions in some detail.

C. FOLLOW-UP STUDY

We conducted a follow-up study of proceedings under section 65 of the Ontario Act which provides for administrative investigation and settlement and, failing settlement, adjudication in cases of discrimination for union activites. In the follow-up study our researcher attempted to ascertain the impact on the plant situation of proceedings under the unfair labour practice provisions of the Ontario Labour Relations Act. In an effort to introduce some element of methodology, we determined to follow up every case decided in the twelve months preceding the commencement of the study. The "section 65" procedure is the most controversial and, in our opinion, has the greatest potential of any of the various kinds of legal intervention in the area of unfair labour practices.

In the course of the summer our researcher managed to interview union officials in the field and management directly involved in 84 "section 65" cases. The interviewer sought to ascertain the impact of government intervention on the relationship between management and employees, whether there was settlement or adjudication.

Questions asked, a list of which is attached as Appendix B, sought information on the job history of the employee involved in the case, an assessment of the relationship in the plant prior to the incident giving rise to the proceeding, an assessment of the relationship thereafter, and the job history of persons involved from the time of the proceeding to the present. The parties were also asked their opinions on the desirability of government intervention and on the effectiveness of the "section 65" process. The interviewer's technique was to ask the questions in the outline and such other questions as were necessary to induce the person being interviewed to talk freely. Frequently he was exposed to a great deal of comment that did not relate to the questions he was to cover, but he simply drew from it the answers to his outline questions.

D. DEFINITION OF TERMS

Unfair Labour Practices

Our suggested terms of reference were "to determine the efficacy of the law of unfair labour practices with respect to unionization, collective bargaining and the administration of collective agreements". Two questions immediately arise: what are "unfair labour practice provisions", and what constitutes "efficacy" in this context?

We chose to ascribe a wide meaning to the term "unfair labour practice". Consideration of other projects commissioned by the Task Force encouraged us to do this, because many of the matters that might be considered to be unfair labour practices under a broad definition were not covered by other studies. For example, picketing may be treated as a union unfair labour practice, and the efficacy of the present legal controls over picketing was

not elsewhere considered. It would have been rather difficult to channel our interviews into consideration of "unfair practices" defined as narrowly as that term is in the federal Industrial Relations and Disputes Investigation Act (I.R.D.I.A.), because the practices themselves and, indeed, the definitions of the term in various provincial Canadian labour relations statutes extend more broadly.

We took our terms of reference to involve a consideration of the law dealing with all those activities, not otherwise illegal, that are prohibited by labour relations statutes. Unfair labour practices, in other words, were taken to be all those activities that the legislature thought it necessary to prohibit in order to ensure free collective bargaining. We could not, of course, study such a broad spectrum of matters in depth, but we could ascertain the consensus of informed opinion as to the efficacy of the present provisions.

Efficacy

What amounts to "efficacy" in the application of legislation depends on the purpose for which the legislation was enacted. Canadian labour legislation has been enacted for two purposes that are not always compatible. The early Canadian labour legislation was undoubtedly directed primarily at the maintenance of industrial peace, but the United States' Wagner Act, from which most of our unfair labour practice provisions have been drawn, was in part, according to its own preamble, enacted to strengthen the hand of the unions and establish them as a countervailing power. It cannot be said categorically that one rather than the other of these purposes must be served by Canadian unfair labour practice provisions if they are to be judged to be efficacious.

In the course of our interviews we asked what the person being interviewed considered to be the purpose of the unfair labour practice provisions: what, in other words, he took as the standard by which efficacy was to be judged. There were, of course, people who could trace accurately the historical antecedents of current legislation, and the opinion was quite widely held that the legislation had been passed to encourage union organization. Many people saw this purpose not in terms of enhancing a countervailing power but rather in terms of serving labour for political reasons. There was, however, no general agreement that this had been the purpose of the legislation. Many of the people interviewed were of the opinion that the legislation had been passed either to ensure industrial peace or to protect the employee in the free choice of his collective bargaining agent. In short, the opinions of the persons interviewed were of little assistance to us in constructing a standard of "efficacy".

We observed that most people in answering our questions relating to specific unfair labour practices judged the efficacy of the provisions in terms of how well those provisions ensured the benefits of free collective bargaining to employees. Management people were concerned with protection against undue influence by union organizers, and labour people with undue influence by management. It may be enough to say that the main aim of the legislatures was to ensure free collective bargaining, remembering that in the Canadian context it is clear that a legislative provision that contributes to industrial unrest and disruption is defeating the purpose of other parts of the legislation.

Our questions were also directed to ascertaining how well unfair labour practice provisions protect the rights of individual employees to join a union and to have the union of their choice represent them, and negotiate and administer the collective agreement in their interests.

CHAPTER II

SURVEY OF INFORMED OPINION

A. GENERAL CONSIDERATIONS

This report of results from our survey of informed opinion does not follow the order of the questionnaire (see Appendix A). The very important question of which institution is most suitable to administer labour legislation is here dealt with first, followed by the results of the other general questions. Several of the questions treated as "general" in the interview guide are reported upon here in connection with one of the four stages of the collective bargaining relationship. A consideration of each of the stages follows our report on more general matters.

General Attitudes Toward Unfair Labour Practices Legislation in Canada

We did not find great dissatisfaction with the overall working of the unfair labour practice provisions in Canadian legislation, nor with the application of other prohibitions and procedures that we investigated.

In the case of labour people there is a large element of what can best be described as "resignation to the inevitable". For example, their general opinion was that there is considerable discriminatory firing but that no amount of legislation would make any great change. Uncommitted people, particularly labour board chairmen and vice-chairmen, were not greatly

concerned with any lack of efficacy in the unfair labour practice provisions and, except in the area of individual rights, management's view was that everything is working well. These broad generalizations are subject to the caveat that this "satisfaction" tended to disappear when the questioning became more specific. Satisfaction was most markedly lacking among those people who had given the matter the most consideration.

There were disturbingly few, even in the select group interviewed who indicated through constructive suggestions or knowledge of alternatives that they had ever considered the question of unfair labour practices from a critical point of view. There were a number of exceptions, of course, principally labour relations board people, highly specialized lawyers mainly in Toronto, and academics.

The Tribunals of Administration: Jurisdiction and Powers

The consensus was that, where it is applicable, arbitration is the most acceptable tribunal to deal with industrial relations. Breaches of the collective agreement that are also unfair labour practices were generally considered to be best dealt with by arbitration, except where the recognized bargaining agent was opposed in interest to the individual affected. In that case, the labour relations boards were considered to be the most suitable institutions.

Apart from the administration of the collective agreement, the broad consensus was that the labour relations boards are the tribunals best suited to administer labour relations law. A surprising number of management people quite unequivocally favoured in principle the broadening of board powers. Several of these were highly specialized Toronto practitioners

who, as a tactical matter, would object to the transfer of jurisdiction to the Ontario Board on the ground that the Ontario Board is biased in favour of labour. The most common management view, however, was that the board's functions should be confined to certification procedures. This view was particularly strong in the Maritimes, where boards are part-time.

Labour people generally favoured a great increase in the jurisdiction of the boards. But in British Columbia and in the Maritimes labour people were in favour of leaving the present jurisdiction of the courts intact. One important labour spokesman from Toronto felt that the courts have an important role in protecting the individual and should retain or be given jurisdiction in that area. Uncommitted people, many of whom were board chairmen or vice-chairmen, considered the boards to be the most suitable tribunals, but the view was quite commonly held that any strictly penal functions should be exercised by the courts.

More specifically, uncommitted people were generally not in favour of giving the labour relations boards power to levy fines for discriminatory firing and other practices. There was, however, a large minority of people whose opinions deserve serious consideration who felt that the boards should have the power to fine in such situations. This was subject to the constitutionality of the power. Many of those who felt that the boards should not have the power to fine simply felt that fines have no place in the administration of labour relations law. That view was concurred in by some of the most respected labour lawyers, although most labour people were in favour of giving the boards fining power.

Most management people were not in favour of giving the boards such power, although many said that they would not object if the boards were not tri-partite.

Tri-partitism

Management people, with some significant dissents, generally did not favour the use of a tri-partite board to decide unfair labour practice cases. Unfair labour practice cases were not considered to be a proper area for "give and take". Uncommitted people in Ontario and Quebec generally shared management's view. These people thought that the chairmen and vice-chairmen had sufficiently practical knowledge and that participation by the nominees in interest merely lengthened proceedings in cases that should be dealt with expeditiously. It was pointed out that protracted consideration in many such cases meant that back wages accumulated which in turn put greater pressure on the chairman who ultimately had to make the decision in any case.

Board chairmen and vice-chairmen in the western provinces and in the Maritimes generally favoured tri-partitism in unfair labour practice cases. Labour people also generally favoured tri-partitism in unfair labour practice cases, although the danger of internal "negotiations" that hinder the development of a valid jurisprudence was recognized by several. The feeling was that labour people have much greater confidence in a tri-partite tribunal.

One uncommitted person, whose experience and position mean that his opinions must be given the highest respect, favoured tri-partitism because it is a safeguard against government pressure, brings practical knowledge to bear, and is no real disadvantage if the board is properly run and operating as an entity. It was pointed out that statistics are not misleading and that there are actually relatively few dissents in cases before the Ontario Board.

The Role of the Field Officer or a "Trial Examiner"

The consensus was in favour of an accommodative approach in labour relations law. The procedure under section 65 of the Ontario Act, which provides for an attempt by a field officer to have the parties settle while reserving to the Board the ultimate power to decide the question, was looked upon favourably by all three groups, particularly the uncommitted people. Labour was unanimously in favour of this approach in principle, but several people expressed reservations in light of the calibre of field officers now active and, in the west, especially British Columbia, there was reservation about giving greater jurisdiction to the boards. Among management people also there was a tendency in the west to prefer courts to boards, but generally the majority of management people favoured the approach taken in section 65 of the Ontario Act.

Labour people, and uncommitted people somewhat hesitantly, favoured the application of the accommodative approach to illegal strikes and lockouts, provided the boards were given the necessary remedial powers. Although they were far from unanimous, management people preferred the courts in these matters. The reasons given were that the necessary remedies were already within the power of the courts, and the courts could move with greater speed.

The suggestion was made to persons interviewed that field officers should be given the power to make binding decisions in cases of unjust dismissal, with appeal to the labour relations board or the courts. It was also suggested that field officers, much better paid and carefully selected as are trial examiners employed by the Trial Examiner's Division of the National Labor Relations Board (N.L.R.B.) in the United States, might also be given

initial decision-making power in industrial conflict situations. With some exceptions, people interviewed did not react favourably to these suggestions.

Several uncommitted people were in favour of giving initial decision-making power to field officers in unfair discharge cases but, in general, uncommitted opinion was not favourable. The ground most often taken was that field officers are not men of sufficient calibre for this responsibility. It was also suggested that the conciliatory function, which is an important aspect of "section 65" procedure, would be destroyed if the field officers had power to make binding decisions.

Labour people did favour giving such power to the field officers although in the less industrialized provinces it was suggested that there were not enough cases to make it necessary.

Management people rejected the suggestion that the field officer be given power to decide cases, generally on the basis that the field officers were not of a sufficiently high calibre. There were dissents from this view, and several leading lawyers in the field found the idea acceptable, provided that the field officers were of the same calibre as board vice-chairmen.

There were two suggestions in this vein which related particularly to industrial conflict. The first, that the field officer have the initial power to declare a strike illegal, found almost no support. One uncommitted person suggested that the case load was simply not sufficient to justify the introduction of this cumbersome machinery into any Canadian jurisdiction. A few uncommitted people saw some merit in the idea, provided that the field officer, through selection and pay, had the status of a trial examiner in the United States system. One or two labour people and a few management

people would concur in this, provided that there was a right of appeal to the labour relations board. Generally, however, all three groups rejected the suggestion.

Secondly, people interviewed were asked whether, assuming a codification of the grounds upon which labour injunctions would issue, it would be desirable to give a field officer power to determine when the number of pickets or the blocking of ingress and egress had passed acceptable limits, and power to issue the appropriate injunction. Uncommitted people, with very few exceptions, did not favour giving this power to a field officer, no matter how carefully selected or well paid. Labour people were hardly more enthusiastic about the idea, although several found it acceptable. Labour people in Nova Scotia thought it could work, perhaps due to very happy experience with the field officer now operating in that province, and two of the most highly respected labour lawyers in Ontario thought the idea would work, although only one favoured it strongly. The other of these two lawyers suggested that the same purpose might be served by an observer whose reports were admissible as evidence at quickly convened hearings by the labour relations board. He would transfer power to grant injunctions to the boards. Management people generally were not in favour of the field officer idea, but surprisingly, a significant number of leading management lawyers in the Maritimes and in Ontario thought that if field officers were of the calibre and had the status of United States trial examiners it might well be desirable to give them the suggested power.

Generally, the informed persons interviewed were not in favour of giving power to make binding decisions in unfair labour practice matters to field officers.

Injuctions—The Courts or the Boards?

Uncommitted and labour people generally, but far from unanimously, favoured giving the power to issue injunctions against picketing to the labour relations boards. Management people almost unanimously favoured retaining the power in the courts.

Board chairmen and vice-chairmen interviewed felt that the injunction power should not be given to part-time labour relations boards. Several favoured leaving the power in the courts, but generally and particularly in Ontario, uncommitted opinion was in favour of giving the power to the board. Two uncommitted people, whose opinions deserve the very highest respect, were in favour of leaving the injunction power with the courts.

Labour people generally favoured giving the injunction power to the labour relations boards, although most of the people interviewed in Quebec favoured leaving the power with the courts, as did several people in the Maritimes. There was some diversity of opinion in the west, and in Ontario labour people were unanimously in favour of giving the power to the Board.

Management people favoured leaving the power to enjoin picketing with the courts. Several of those who saw merit in giving a field officer power to make the initial decision nevertheless felt that his decision should be subject to review by the courts rather than by a board. There were, however, several management people who thought that the board, if it were improved in calibre and status, could handle the injunction power better than the courts.

Uncommitted and labour people were generally not satisfied with the existing procedure by which labour injunctions are obtained. Uncommitted

people in Newfoundland and Nova Scotia thought the procedure worked satisfactorily because, they said, as a matter of practice the judges required notice to the other side. This was not wholly concurred in by labour people in those provinces. One very eminent labour lawyer in Ontario was satisfied with the existing procedural provisions but all others expressed dissatisfaction with ex parte issue of injunctions. Management people were generally satisfied with the injunction procedure although some mild concern was expressed over the ex parte issue of injunctions.

Private Rights of Action for Damages for Breaches of Unfair Labour Practice Provisions

It is well established that a breach of the "no strike" provisions in each labour relations act gives rise to a private right of action, whether by virtue of the doctrine of conspiracy (see Gagnon v. Foundation Maritime Ltd., [1960] S.C.R. 435) or directly. Nevertheless, not many uncommitted people were ready to answer the question whether there is and whether there should be a private right of action for any breach of the unfair labour practice provisions. In British Columbia there clearly is such a right of action by virtue of the Trade-unions Act, R.S.B.C., 1960, c. 384, s.4.

The general opinion of uncommitted people seemed to be that there should not be a private right of action arising out of breach of the unfair labour practice provisions.

A majority of labour people thought that there should be such a private right of action. Labour opinion in Quebec was that there is such a right and that there should be, and existence of the right was found acceptable in British Columbia. There were, however, a significant number of labour dissents from this view, including two of the foremost Ontario labour lawyers,

who felt that as a matter of law there is such a right but that there should not be.

Management people were not certain whether there were private rights of action except for illegal strikes. General opinion was that a private right of action was necessary where there was an illegal strike because the other remedies are inadequate. There was, however, considerable divergence on the question of whether there should be a private right of action based on management unfair labour practices.

Trade Unions as Legal Entities

The general opinion among persons interviewed was that unions should be treated as legal entities for purposes of the enforcement of the unfair labour practice provisions. There were dissents by one academic and one board member, both worthy of high respect, and several labour people objected. However, a clear majority of uncommitted and labour people were in favour of treating unions as entities for these purposes, and management people were almost unanimously in favour of doing so.

Principal Abuses of Labour Relations Legislation

At the commencement of the interview, the people interviewed were asked what they considered to be the main abuses of the unfair labour practices provisions by unions and by management. This question was asked principally as a "starter", but a general statement of the views expressed may be of interest.

Wildcat strikes were considered by both management and labour people interviewed to be the most severe abuse by unions of the scheme of the

legislation. A somewhat lesser number of both management and labour people specified unfair organizing tactics as the principal abuse of the legislation by unions. They mentioned misinforming employees, threats of job loss if the union was certified, visits to the home, and extreme social pressure. Uncommitted people and a number of labour and management people, including several of the most deeply involved Toronto lawyers, were concerned that consent-to-prosecute applications and proceedings under section 65 of the Ontario Act are frequently initiated for tactical reasons, to aid in organizing or to bring additional pressure in negotiations. The proceedings are then dropped, before they actually come on for hearing. There was an interesting contrast with the opinions expressed by lawyers on both sides in New Brunswick, that the "principal abuse" of the legislation by the unions was their failure to make use of the legislative provisions open to them.

Delay through over-concern with technicalities and over-use of any legal proceedings available was considered by many union people, and a number of management people, to be the principal abuse of the labour relations legislation by management. People interviewed in Quebec especially objected to delaying tactics. It was repeatedly pointed out that in union-management relations the passage of time benefits management and that management frequently seeks to take advantage of this fact.

Discriminatory firing, particularly during the organization stage, was thought by many to be the major abuse by management, principally in small firms where unsophisticated management panics at the approach of the union. Undue employer influence and the fostering of petitions for use in certification proceedings were also considered to be among the most frequent

management abuses. In Ontario, British Columbia, and in larger firms generally, departures from the scheme of labour relations legislation were said most commonly to take the form of fostering petitions and other subtle influences. In small firms in Quebec and in the Maritimes, paternalism was considered to be widespread. The view was expressed by several leading lawyers from both sides in the Maritimes that what was involved was frequently misguided employer goodwill rather than ill-will for his employees. It was suggested in Prince Edward Island that the principal concern was not with unfair labour practices but with the more basic problem of enforcing minimum wage laws.

Lockouts

All three groups interviewed agreed that illegal lockouts are very rare in Canada. Where they do occur, it is usually at the organization stage or during the negotiation of a first agreement. A civil right of action for loss of wages was considered to be an appropriate remedy by all groups, particularly labour people. Uncommitted people felt that prosecution was also appropriate and about half of the management people interviewed thought that prosecution with provision for healthy fines was more desirable than a civil right of action. Generally lockouts were considered to be such rare occurrences that they were hardly worth talking about.

B. THE ORGANIZATION STAGE

Management Unfair Labour Practices

Relevant Legislation 1/

The statutory provision of greatest importance at the organization

stage is s. 4(3) of the federal Act by which it is made an unfair labour practice for an employer or person acting on behalf of an employer to refuse to employ, refuse to continue to employ or in any way discriminate against a person because he is or was a member of a union. The section also prohibits the imposition of any condition in a contract of employment to restrain an employee from exercising his rights under the act. Section 4(4) also prohibits threats of any kind made by an employer with a view to compelling an employee to become or to refrain from becoming or to cease to be a member or officer of a trade union. 2/

Section 4(3), (4) and the procedures for enforcement of the rights thus given to employees were the concern of a very large part of our inquiry. In every jurisdiction there is provision for prosecution of employers in breach of these provisions. 3/

Prior to prosecution there must be consent by the Minister of Labour or, in some jurisdictions, by the Labour Relations Board, except in P.E.I. where there is no provision requiring consent. 4/

The federal Act, section 44, provides that any person claiming to be aggrieved because of an alleged violation of any of the provisions of the Act may make a complaint in writing to the Minister. The Minister may then appoint a conciliation officer under section 44(1) or, pursuant to section 56, may require an Industrial Inquiry Commission to investigate and make a report in respect of the alleged violation. Section 44 does not provide for settlement or adjudication. It contemplates that satisfaction of the complaint shall be obtained through prosecution. There is, however, provision for reliance on the report of the Industrial Commission Inquiry by the Minister in granting consent to prosecute. There is similar legislation in

Newfoundland, sections 45 and 54, and Nova Scotia, section 44. Quebec has a somewhat different arrangement (see secs. 14 - 18), and British Columbia and Saskatchewan have provision only for adjudication. In three jurisdictions there is provision for full administrative inquiry and settlement or adjudication which may result in reinstatement where there has been a breach of the provisions. The prototype is Ontario, section 65, which provides for both inquiry and settlement, and adjudication. There is similar legislation in Nova Scotia (section 40), and Manitoba (section 6A).

Section 367 of the Criminal Code makes it a criminal offence for an employer to refuse to employ or to dismiss, to discriminate against or to intimidate for union activities.

Section 4(1) of the federal Act prohibits an employer or person acting on his behalf from participating in or interfering with formation or administration of a union and from making any financial contribution in support of its endeavours. 5/ Ontario section 48, Manitoba section 4(1), Newfoundland section 4(1), and Saskatchewan section 9(1)(g) also prohibit employer interference in the "selection" of a trade union. The Labour Relations Acts of Manitoba, Nova Scotia, Ontario, and Saskatchewan modify the provisions against employer interference by declaring that nothing in the statute is to affect an employer's freedom of expression. 6/

Breach of section 4(1) of the federal Act and its equivalents subject the employer to prosecution upon consent, as mentioned above, but, as a practical matter, enforcement comes through section 9 of the federal Act, which empowers the Labour Relations Board to take into account such employer activities in determining whether or not to order a vote in certification proceedings. 7/

General Assessment

It is clear that both before and after the enactment of the current prohibitions dismissal for union activities and related practices have occurred mainly at the organization stage of union-management relations. The general opinion among uncommitted, labour and management people was that the law now affords unions an adequate opportunity for organization where they are opposed by management or an incumbent union. Unfair labour practices at the organization stage continue to occur mainly in small companies and in unindustrialized parts of the country. Some labour people felt that the law does not have sufficient teeth yet and some management people felt that it goes too far. In British Columbia there were complaints that political intervention prevented the proper working of the unfair labour practice provisions and in New Brunswick it was generally agreed that unions did not take advantage of the legal scope allowed for their operations. But for the most part, the answer to the general question was that the law is adequate.

1. EMPLOYER INTERFERENCE IN THE FORMATION OR THE ADMINISTRATION OF THE TRADE UNION

Section 4(1) of the federal Act and its equivalents makes it an unfair labour practice for an employer to participate in or interfere with the formation or administration of a trade union. By section 9(5) of the federal Act, an agreement made between an employer and a union thus dominated is deemed not to be a collective agreement and the Labour Relations Board is prohibited from certifying such a union. 8/ Saskatchewan, sections 2(d), 5(b), (h) and 6, similarly prohibits certification of an employer dominated union, but does not deal explicitly with its collective agreement. Neither matter is explicitly dealt with in the Quebec Act.

The opinion of all three groups interviewed was that dominated unions are no longer a significant problem, and to the extent that they do exist, the real remedy is not prosecution for an unfair labour practice but denial of certification to the union and the lack of binding effect of its collective agreements.

2. EMPLOYER INTERFERENCE IN THE SELECTION OF A BARGAINING AGENT

Employer interference in the selection of the trade union is expressly prohibited by s. 48 of the Ontario Act, by s. 4 of the Manitoba Act, s. 4 of the Newfoundland Act, and s. 9(1) of the Saskatchewan Act. Interference in "selection" is, in the opinion of people interviewed, much more common than interference in formation and administration of trade unions. The general opinion was, nevertheless, that here also the real remedy lies in the certification process, where proof of interference by the employer leads to certification without a vote, if the required minimum membership can be established by documentary means. This means that the real remedy is much more effective in Ontario where the Labour Relations Board is empowered to certify on documentary proof of 45% membership if it is satisfied that there is real majority support and that employer influence would distort an election. Interference by the employer will, of course, also lead the labour relations boards to exclude petition evidence of employee withdrawal of membership from the union.

Labour relations boards in the federal jurisdiction and in those provinces in which employer interference in "selection" is not directly prohibited as an unfair labour practice appear to be much less sensitive in certification proceedings to employer interference than is the Ontario

Board. There is no directly necessary connection between the wording of the unfair labour practice section and the effect in certification proceedings. Moreover, it was suggested by a person well informed in the matter that even prior to the amendment by which the word "selection" was inserted in section 48 of the Ontario Act, the Ontario Board was as sensitive in its certification proceedings as it now is. Nevertheless, such an amendment in other jurisdictions would doubtless affect the attitude of the boards in certification applications.

The general opinion of all three groups interviewed was that although employer interference is almost never prosecuted as such, it should continue to be specified as an unfair labour practice to ensure that the policy of the law is made clear. Management people generally concurred in this although some thought that interference should be made only relevant as a consideration in the certification process and many suggested that employers' rights should be greater and more clearly delineated in this connection.

There were quite clear regional variations in opinions estimating the amount of employer interference that occurs in selection of bargaining agents. It is difficult to say how much of this variation is due to differences in the standard of acceptable interference. For example, uncommitted and labour people in Ontario felt that there were still many instances of interference with selection, a view with which management did not agree. It was pointed out that the view of uncommitted and labour people reflects the fact that the Ontario Labour Relations Board takes a much more stringent attitude toward interference in selection than do the labour boards of the other jurisdictions. In contrast, the general opinion in Quebec was that there was not a great deal of interference but there were <u>management</u> dissents from this view. It was pointed out by labour people that there was little interference compared to the situation a very few years ago.

The consensus seemed to be that there was less interference with selection in the western provinces, although such practices were certainly not unknown, particularly in British Columbia and Manitoba.

In the four Atlantic provinces there continues to be a great deal of paternalism in the smaller industries which account for a considerable proportion of the total employment. Employers have not generally accepted the fact of unionism and consequently there is a great deal of unchecked interference in selection which, if it occurred in Ontario, would be dealt with before the Labour Relations Board.

Employer Free Speech

All three groups were satisfied that the labour relations legislation does not unduly infringe employers' freedom of speech, although there were some dissents. Management people were concerned with the necessity of "setting the facts straight" and felt that if this were assured by some means other than an employer's speech then no objection could be taken to the limitation on his right to speak to his employees.

Many people felt that increased general education in labour relations would be of great assistance.

The labour relations acts of Manitoba, Nova Scotia, Ontario and Saskatchewan declare that nothing in the statute is to affect an employer's freedom of expression. Management people felt that this legislative declaration served a valuable educational purpose. Many suggested that the provision should more specifically set out the proper limits of an employer's right to inform his employees. Labour and uncommitted people generally thought that the provision had no value, but there were many dissents from this

view. The labour view was that the section is merely an invitation to excesses by the employer in involving himself in what is really not his business.

Suggestions for Better Assuring Representation of the True Wishes of Employees

People interviewed were asked "How might representation of the true wishes of employees be better assured?" The most common suggestion was that there be a vote on every certification application, and that it should be a "quick vote" taken upon the showing of the union that it could command support of, say, 30% of the bargaining unit. There were a few people who expressly rejected this solution, generally on the basis that it would result in a poor organizational foundation for many certified unions. One prominent labour lawyer suggested that this would only reward the employer who effectively intimidated more than 70% of his employees.

Labour and uncommitted people who were in favour of the "quick vote" stressed the importance of requiring that the union get a majority of those voting rather than of the membership of the unit. Only in this way, it was said, could there be true secrecy of ballot. The Nova Scotia Act puts certification on this basis now.

The chairman of one part-time labour relations board thought that a system of "quick votes" could not be administered by such a board.

There were a variety of other suggestions, including a simple raising of standards in other provinces to the level now pertaining in Ontario, providing a board officer or other independent official to give an educational speech, allowing management to put the facts before his employees,

and several management people stressed the importance of controlling union pressure tactics. There was a considerable number of labour and management lawyers who felt that existing legislation was quite adequate. A lesser number felt that existing legislation as administered was satisfactory.

A Dilemma for Management Lawyers

Quite clearly, the existing law of employer interference in selection poses a considerable dilemma for the management lawyer. He is accused by labour people of actually perverting the management of many small companies and encouraging them to interfere with selection. The management lawyer, on the other hand, argues that he is simply telling his clients what the limits of the law are and how far he may go.

A particularly difficult problem arises when a group of employees who dissent from the union that is trying to organize their plant, turn, naturally enough, to the employer for advice. To make their objection effective, the dissenting employees organize a petition and present it to the labour relations board in a manner which, as a practical matter, requires that they have legal assistance. The Ontario Labour Relations Board and the lawyer for the union applying for certification are very careful to determine whether the employer has influenced the petitioners at any stage. The source of fees for any lawyer acting for a group of petitioners is very often a matter raised on cross examination, and if the fee comes from the employer the petition will probably be held to be employer influenced. How else, many management lawyers asked, can a group of dissenting individual wage labourers afford a lawyer? One prominent labour lawyer conjectured whether legal aid would henceforth be available to such dissenting groups.

3. THE "YELLOW DOG" CONTRACT

Section 4(3)(b) of the federal Act provides that no employer or person acting on his behalf shall seek to impose a condition in the contract of employment that restrains an employee from being a member of a trade union.9/ People interviewed almost unanimously said that such contracts are no longer a problem. There were a few people who said they had seen such conditions in writing and several who alleged that oral promises to the prohibited effect were sometimes extracted, but the general opinion clearly was that there is no longer a problem. It was, however, generally felt that the legislative prohibition helped to explain the absence of the practice and should be retained.

4. REFUSAL TO HIRE, DISCRIMINATION, THREATS AND FIRING FOR UNION ACTIVITIES

A consensus of opinion was that section 4(3)(a), (4) of the federal Act and its equivalents, particularly in Ontario, as enforced, is a reasonably effective deterrent against the important employer unfair practices of firing, discrimination and threats for union activities. However, it was also generally accepted that the legislation is ineffective against a subtle and well-advised employer. Moreover, it is considered very difficult to enforce the provision against refusal to hire because of union activities. The attitude of a considerable number of labour people and many management people was that no legislation could effectively prevent refusal to hire or firing, the real motive for which is union activism but for which other plausible reasons can be given. Board people and labour people in Quebec were somewhat better satisfied due to the operation of the reverse onus provision in s. 16 of the Labour Code. Section 16 provides:

> If it is shown to the satisfaction of the Board that the employee exercises a right accorded to him by this code, there shall be a presumption in his favour that he was dismissed, suspended or transferred because he exercised such right, and the burden of proof that the employee was dismissed, suspended or transferred for another good and sufficient reason shall be upon the employer.

The opinion was expressed by a few uncommitted people that effectiveness is very largely a matter of the approach of the administering board.

The presence of section 4 of the federal Act and its equivalents on the statute books of the provinces was generally thought to have a considerable deterrent effect, although it was suggested that management in general has matured sufficiently to abstain from such activities quite apart from the sanctions provided. It was almost unanimously accepted that the provision in all statutes, other than those of Ontario and Saskatchewan, that "nothing affects the employer's right to suspend, transfer, lay-off, or discharge for proper cause" really adds nothing to the legislation.

The Ontario legislation as administered was considered to be quite effective, although there were a few labour dissents from this view. The law was considered to be administered with reasonable effectiveness in Alberta, Saskatchewan and Manitoba. There was some dissatisfaction in British Columbia, especially among the labour people, although management people also called for more explicit statements of policy by the British Columbia Board. In the Atlantic provinces the broad consensus seemed to be that there is still considerable firing for union activities, although very few cases have come before the boards or the courts. Management people suggested that the unions are not diligent in pressing their causes, union people complained that employees would not press the matter, and board

people simply said that the cases did not come before them. This state of affairs was less marked in Nova Scotia than in the other three Atlantic provinces.

Suggestions for Improving Protection of the Rights of Employees

Persons interviewed were asked how the legislation could be made more effective in connection with these unfair labour practices. There was a marked lack of suggestions. It was reiterated that the answer lies in administration, not in legislation. In some provinces it was urged that the calibre of the board had to be improved. Only a few people spoke in favour of giving over original decision-making power to a high calibre "trial examiner" type of field officer.

Uncommitted people in Quebec, subject to one strong dissent, thought the shifted onus in the Quebec Labour Code to be of importance. Labour people in Quebec consider it absolutely necessary. Board and other uncommitted people in Ontario were not in favour of a shifted onus, although there were several strong dissents. Labour people generally thought the onus should be shifted but, in British Columbia particularly, they were skeptical that it would make any real difference in the outcomes. Labour people in Saskatchewan thought this to be borne out by their experience with both forms of legislation. Management people in Ontario stressed that, in practice, before the Ontario Labour Relations Board the onus is already on the employer in such cases. Generally management people were against the shifted onus, naturally enough, but were not as strong in their feelings as was labour in taking the opposite view, and there were some management opinions in favour of shifting the onus. Uncommitted people in

Nova Scotia and New Brunswick favoured shifting the onus. In Saskatchewan, where prior to the 1966 amendment of s. 9(1)(e) the onus was clearly on the employer, uncommitted and labour people favoured such an onus.

It was suggested by several people that the best approach is to equip the administrative tribunal with a broad range of remedies by which it could enforce the general policy objective of ensuring free collective bargaining.

Enforcement Mechanisms 10/

There are two types of remedies that may be available where employer unfair practices against union activities have occurred: accommodation and penalty. Labour and management people almost unanimously favoured the accommodative process in resolving unfair labour practice cases, but there were a few labour people and a limited number of management people, including some whose opinions are worthy of particular respect, who felt that unfair labour practices should be a matter of a judgment of right or wrong, rather than accommodation.

In every jurisdiction there is provision for prosecution in the magistrates' courts, with the consent of the labour relations board in some jurisdictions, or in others, with the consent of the minister of labour. In the federal jurisdiction and in British Columbia, New Brunswick and Newfoundland the magistrate is specifically given power to order a reinstatement of an employee to the same position that he held prior to the unjust dismissal. The magistrate also has the power to order compensation. A magistrate in Alberta has power to order compensation but not reinstatement.

Generally there was agreement that magistrates' courts are not suitable institutions to deal with unfair labour practice cases. The only dissents

from this view came in New Brunswick and Prince Edward Island where labour relations boards are part-time and, for economic reasons, reasonably able lawyers accept appointment as magistrates. The procedure of prosecution after consent was therefore generally thought not to be a useful remedy except perhaps in a situation of a continuing offence. Several labour lawyers said that they would turn to prosecution only where the case was strong enough to ensure conviction and so extreme that the publicity attaching to a conviction would be desirable.

If prosecution following consent were to be retained, the labour relations board was generally considered to be the best body in which to vest the consent jurisdiction. There was some dissent from this in the Atlantic provinces because the boards are part-time. There were some people who felt that the tri-partisan make-up of the boards is a disadvantage in this connection. The majority of people interviewed were not in favour of allowing prosecutions to go directly to the courts without consent, as is the case under the P.E.I. legislation, although many people objected to the extra steps involved and suggested that the boards should dispose finally of the matter. A bare majority of management people did favour allowing the matter to go directly to the courts.

In general those interviewed did not favour having the boards or the departments of labour take the initiative in prosecuting unfair labour practice cases. There were some significant dissents from this view among labour people who were impressed with the practice before the National Labor Relations Board in the United States.

In Ontario, Manitoba, Nova Scotia and British Columbia there is provision for investigation and accommodation following complaints that

employment has been interfered with by unfair practices. 11/ The investigation is carried out by a labour relations board field officer who seeks accommodation between the parties and, failing that, the board has the power to decide the matter, with power to order reinstatement and compensation. Section 5 of the Saskatchewan Act gives the Labour Relations Board power to order reinstatement and compensation in such cases but there is no provision for the process of accommodation. The same is true of ss. 14 - 18 of the Quebec Labour Code, but apparently, as a matter of practice, a conciliation officer seeks accommodation before the Quebec Board considers complaints under those sections. The same sort of "de facto section 65 proceeding" operates under the federal Act and in Newfoundland. Upon complaint the Minister of Labour 12/ will appoint a conciliation officer or Industrial Inquiry Commission to investigate the situation. On the face of it, this is a device for gathering facts upon which the Minister may rely in an application for consent to prosecute. 13/ In practice, the inquiring officer may effect accommodation between the employer and the employee who has allegedly been subject to the unfair labour practice. The consent to prosecute provisions in the New Brunswick legislation (ss. 38 and 44) are identical to those in the federal Act and, although the New Brunswick Act does not specifically provide that in granting consent to prosecute, the Labour Relations Board may rely on the report of an inquiry under s. 51 and the same de facto accommodative process occurs in practice.

The Operation of "Section 65 Procedure"

The persons interviewed may broadly be said to have expressed satisfaction with the part played by the field officer in procedure under s. 65 of the Ontario Act and its equivalents in other jurisdictions.

Uncommitted people were impressed by the 60% success rate of field officers in Ontario but it was felt that there was room for improvement in the calibre of officers and their training, which it was thought could not be achieved without an increase in salary. The opinion of labour people varied and generally, perhaps, was not as positive as that of the uncommitted people. Among management people there were wide variations; some condemned the field officers outright, others praised them highly.

The assessment of the field officers in other provinces was somewhat similar, with generally greater criticism in Quebec and high praise in Nova Scotia.

It was felt in Ontario and in Nova Scotia that the field officers have a considerable educative role to fill, especially in dealings with small employers. Several prominent management lawyers suggested that this was not a proper role for the field officer, but the general opinion was not only that there was such a role but that the field officers do an acceptable job of filling it, except perhaps in British Columbia.

There was virtually no complaint that field officers act other than in reasonable accord with the rules of natural justice, which require an unbiased hearing to be given to those involved in a dispute.

The majority of the persons interviewed felt that the discretion and power exercised by labour relations boards under s. 65 of the Ontario Act and its equivalents was not excessive. Uncommitted and labour people generally thought that the board should be given even greater discretion and flexibility of operation. There was a very significant number of dissents from management people, including some of the most competent lawyers in the

field, who felt that the board had so much discretion that the law was rendered uncertain and subject to the vagaries of internal accommodation on the board.

The Ontario Board strives hard to achieve natural justice by, among other things, not allowing the "hearing panel" in any case to see the field officer's report. It is seen only by a "screening panel" of the Board which determines whether a prima facie case is disclosed. There was no great dissatisfaction with the procedure of the Board, although a few management people commented that the "screening panel" was a waste of time. There was also some objection in Manitoba and British Columbia to the generality of the Boards' procedure and in British Columbia to the Board's refusal to make public its reasons for decisions.

Possible Changes in Procedure Before Labour Relations Boards

People interviewed were asked several specific questions relating to possible changes in proceedings before the boards.

The general opinion was in favour of a speed-up of board procedures in unfair labour practice cases. It was pointed out that the tri-partisan nature of the boards, particularly because the nominees in interest are part-time, slows down proceedings. In Quebec, Nova Scotia and Manitoba, uncommitted people concurred with labour people in thinking that there should be a speed-up. Management people concurred with this view but did not feel the urgency felt by labour. Four of the most prominent Toronto specialists dissented from the suggestion and generally in Ontario the pace was considered to be acceptable, although labour would prefer even speedier disposition of cases.

There was general satisfaction with the nature of particulars required in allegations of unfair labour practices, and the feeling was that the matter should be left to the board rules and administration. There was a general feeling among board people that they now go far enough in circumventing technical objections, but labour people felt that the power to do so should be clarified. Management people generally concurred in this, although three of the leading specialists in Toronto felt that the Labour Relations Act was sufficiently weighted in favour of unions that "they should have to play by the rules". In Prince Edward Island labour people felt that it was essential that the Board and management be impressed with the Board's power to circumvent technical objections.

Labour and management people generally thought it would be desirable if the board kept a record of evidence, although there were some strong management dissents. There was a wide divergence among uncommitted people on this point. The principal objections were that proceedings would be slowed down, made too costly and too court-like and would be more open to judicial review. A very experienced person suggested that the result would be far too much "talking for the record" and that counsel would want to wait for transcripts of the evidence before giving argument, which would cause great inconvenience.

Labour and management people generally felt that the board should give reasons for all decisions in unfair labour practice cases. There was some dissent by management and one labour person commented that this might lead to inflexibility, but generally it was felt that without reasons a satisfactory jurisprudence would not develop. The "horse-trading" and dodging of issues, which were thought by several to be the accoutrements of tripartitism, would, it was thought, be cut down by a requirement that reasons

be given. There was a divergence of opinion among uncommitted people, the strongest objection being that part-time boards simply did not have time to write reasons in every case.

Uncommitted people generally favoured the 15-day limitation period on complaints of unfair dismissal which is imposed by s. 15 of the Quebec Labour Code. Several considered the period too short and suggested 30 days, but all were concerned that without a limitation period the complaint procedure may be abused. It was stressed that the union should not be allowed to keep a number of potential complaints in abeyance to use as bargaining levers. Labour people generally agreed that some limitation period was justified and in many cases suggested 30 days with provision for reasonable extensions. Management people were unanimously in favour of a limitation and most found 15 days acceptable, although some suggested five days and some one month.

Section 367 of the Criminal Code

Very few people interviewed even realized that it was contrary to the Criminal Code to fire or otherwise discriminate against an employee for union activities. Many of the people interviewed in Ontario had never heard of the section. There have been some cases in Quebec on the section, notably R. v. J. Alepin Frères Ltée. and Clement Alepin (1965), 65 CLLC, para. 14,048 (S.C.C.). A few people interviewed in Quebec pointed out that the provision may be of use to an employee or his union where there is delay in getting consent to prosecute, which in the past may have been so for political reasons. Prosecution under the Criminal Code also evades the 15-day limitation period on unfair labour practice complaints under the Quebec Labour Code. The union or employee does, however, lose the advantage of

the reverse onus under the Labour Code. One labour lawyer in Nova Scotia had once relied on the Criminal Code section in what he considered a particularly blatant case where the employer deserved the publicity and stigma of a prosecution under the Criminal Code. Despite the obscurity of s. 367 of the Code, general opinion seemed to be that it should be retained as a useful nationwide statement of principle.

Union Unfair Labour Practices

Relevant Legislation

The most important union unfair labour practice particularly relevant to the organization stage is the use of intimidation or coercion to compel people to become trade union members. 14/

In every jurisdiction except Saskatchewan, organizing on the employer's premises without consent is prohibited. 15/ Section 53 of the Ontario Act is a variation in that it merely provides that nothing in the Ontario Act authorizes any person to persuade an employee during working hours to become a member of a trade union, which throws the matter back into the common law of trespass. Sections 7, 8 and 9 of the Quebec Labour Code make special provision for organizing employees in logging and mining operations in Quebec, by which any union representatives holding a permit issued by the Labour Relations Board must be allowed access to the camp where employees of such operations are living and must be supplied with food and shelter.

Also relevant are the provisions relating to prosecution upon consent, which constitutes the sanction for breaches of section 4(4) of the federal Act and its equivalents. Section 65 of the Ontario Act and its equivalents is probably also applicable to union unfair practices. The equivalents in

other jurisdictions of section 4(4) of the federal Act and section 65 of the Ontario Act are set out under the heading "B. THE ORGANIZATION STAGE; Management Unfair Labour Practices: Relevant Legislation" earlier in this chapter.

General Assessment

Very few people interviewed were able to define with any certainty "intimidation and coercion", as used in section 4(4) of the federal Act and its equivalents. However, the most common form of undesirable pressure in organizing is the threat that if the employee does not join the union there will be no job for him once it is certified, and this was generally considered to be contrary to section 4(4). Clearly this section is principally applicable at the organization stage.

There was no strong consensus, even among labour people, in favour of allowing unions any greater access to company premises for organization purposes than is now given.

1. INTIMIDATION AND COERCION TO COMPEL MEMBERSHIP IN A UNION

All three groups interviewed agreed that intimidation and coercion contrary to section 4(4) of the federal Act and its equivalents occurs principally during organization. There was considerable divergence of opinion over just what constituted prohibited "intimidation or coercion". Most uncommitted people thought that it extended to include extreme social pressure, and nearly all thought that it included any threat against an employee's job. It was therefore, in the opinion of uncommitted people, illegal to threaten an employee that if he did not join the union there

would be no job for him when the union was certified. Generally, uncommitted people favoured a very broad definition of "intimidation and coercion" even though in the context of the Criminal Code picketing provisions "intimidation" has been judicially defined to mean "threats of illegal acts".

Labour people took almost as broad a view of "intimidation and coercion" as the uncommitted people. Their general opinion was that everything beyond social pressure, including a "no job" threat, comes within the prohibition. Management people also considered the "no job" threat to be illegal. However, two of the leading Toronto specialists said that it is quite clearly established that the Ontario Labour Relations Board does not consider anything short of the threat of an unlawful act to fall within the prohibition.

It was generally agreed that the labour relations boards are the institutions best suited to enforce section 4(4) of the federal Act and its equivalents. Uncommitted people favoured the boards, except in Newfoundland where it was thought that magistrates would be more suitable and in Quebec where Board people interviewed simply did not want anything added to Board jurisdiction for "practical" reasons. Labour people favoured the boards, except for several people in Quebec who preferred the courts, even magistrates. to the tri-partisan Board. Several management people in Quebec also objected to giving jurisdiction to enforce the equivalent of section 4(4) of the federal Act to the Board. Elsewhere, despite concern over a lack of judicial review, loose rules of evidence and so on, even management people favoured giving this particular jurisdiction to the Board.

The general opinion in Ontario, shared by all, was that s. 65 procedure is available to provide redress for breaches of s. 52, and that it should be.

In Quebec, s. 14 of the Labour Code was considered not to be available nor was it generally thought that it should be. In other provinces, board proceedings were generally thought to be more desirable than going to court.

2. ORGANIZING ON AN EMPLOYER'S PREMISES WITHOUT HIS CONSENT

There was no general discontent with the legislation that prohibits a union from organizing on an employer's premises without his consent nor was exception taken to it by any group.

None of the three groups interviewed in Ontario felt strongly that s. 53 of the Ontario Act, which leaves the matter at common law, should be amended to positively outlaw such organizing. It was explained that Ontario s. 53 is worded as it is to prevent any attempt to invoke the prohibition against employees who "talk union" on the job. As one prominent union representative said, organizing does go on among employees on the job and always will. The real question is whether full-time organizers are to be permitted on the premises. That same union organizer did not feel that there was any necessity in the ordinary industrial situation to provide that the union organizer be allowed on the premises.

Among uncommitted people there were some suggestions that organizers should perhaps be given the right to enter the premises during lunch break, or that the boards should have the power to order management to allow entry under special circumstances, but such views were not expressed generally. Labour people generally did not favour granting a right of entry to union representatives except in the case of remote logging or mining establishments of the kind now covered by ss. 8 and 9 of the Quebec Code. Uncommitted people in Quebec were generally satisfied with the operation of those sections, as were management people. Management people in other provinces

saw the merit in the special Quebec provisions but, except in Ontario, it was not felt that there was any demand for similar legislation. A few labour people and a few management people did favour limited rights of access by union representatives to employers' premises, in order to ensure presentation of alternatives to employees.

C. THE RECOGNITION STAGE

Management Unfair Labour Practices

Relevant Legislation

The efficacy of the legislation at this stage was considered in relation to the following practices:

1) The making of "sweetheart" agreements, in the rather broad sense of agreements made with a union known to management not to be the union of choice of the majority of its employees. Manitoba, section 11(2), Newfoundland, section 11(1)(b), and Ontario, section 45a, which provide for termination of certain agreements are relevant to this practice. Federal section 4(1) and its equivalents which prohibit employer interference in union affairs are also relevant. Those sections are set out under the heading "B. THE ORGANIZATION STAGE; Management Unfair Labour Practices: Relevant Legislation".

2) Discrimination for union activity. 16/

3) Discrimination directed against witnesses to board proceedings. 17/

4) Changing wages and working conditions. 18/

5) Abuse of certiorari proceedings.

General Assessment

The sum of opinions seems to be that, from the union point of view, there is no problem of management unfair labour practices that is peculiar to the recognition stage. Problems of discriminatory firing are neither greater nor less than during the organization stage and the consensus seemed to be that there was no need for increased protection against other practices. With regard to the position of the individual employee, there was a consensus of concern for the minority who did not support the union that gained recognition. Nevertheless, many union people and some management people expressed doubt concerning the extent to which any law could protect dissidents.

1. SWEETHEART AGREEMENTS

The majority opinion was that there is adequate legislative protection in the situation where an employer recognizes as bargaining agent a union which he knows does not have the support of a majority of his employees. Most people interviewed were against any enactment that would make it an unfair labour practice to enter into such an agreement. Ontario, section 45a, Manitoba, section 11(2) and Newfoundland, section 11(1)(b), give the employees the right within a limited time to seek termination of the agreement in such a situation, and this was generally considered to be adequate legislative protection. Uncommitted opinion supported this view but, in several cases, subject expressly to acceptance of the Ontario Labour Relations Board's ruling that an agreement made under such circumstances may constitute no bar to certification.

There were three important dissents from the view that making such agreements should not be an unfair labour practice, on the express ground that the legislation was for the benefit of individual employees, and they are inadequately protected if such agreements may be made.

Labour people were generally of the opinion that such agreements should be considered unfair labour practices, although this was far from a unanimous view. Several labour people mentioned the great difficulty of proving support, or lack of it, for the union, short of requiring certification and in effect doing away with voluntary recognition. One very important labour leader suggested that voluntary recognition should, indeed, be done away with. Legitimate unions, he felt, have nothing to gain by it and it may be to the detriment of employees.

Management opinion was, quite strongly, to the effect that present safeguards in this connection are sufficient. The construction industry, it was pointed out once again, is a rather special case, and in that industry if it were made an unfair labour practice to enter into such agreements much of the existing structure of collective bargaining relationships would be destroyed.

2. FIRING FOR UNION ACTIVITIES

The consensus, contributed to equally by all three bodies of opinion, was that this activity occurs during organization and does not halt just because application is made for certification. The employer, if he is so inclined, moves when he learns who the union activists in his plant are. However, once certification is obtained the general opinion was that the employer accepts the situation and thereafter seldom indulges in such

activities. The consensus of opinion in Quebec was that there were relatively frequent firings immediately after certification, but this seems to be a regional difference.

The special problem of protecting the individual who supported a union other than the one recognized, whether voluntarily or by certification, arises at the recognition stage. On the face of it, of course, the prohibitions in section 4(3) and (4) of the federal Act and its equivalents apply equally to his case. But the practical question must be asked whether the employee is adequately protected when the newly incumbent union, for its own reasons, will not invoke the legal protections of the legislation on his behalf. The uncommitted persons interviewed divided almost equally into three groups: 1) those who were concerned about this lack of protection and favoured legislative action, although they felt unable to offer any panacea; 2) those who were concerned but felt that greater protection was impossible in a collective system; and 3) those who felt that protection of the individual was adequate. Labour people interviewed generally considered that the Acts did not provide satisfactory protection but many expressed doubts that it could be achieved. Possible solutions such as a right to grieve without union intervention, the creation of a right for employees to invoke the arbitration machinery, and the creation of a duty of fair representation are considered below in connection with the administration stage.

3. REPRISALS AGAINST WITNESSES IN CERTIFICATION PROCEEDINGS

Our survey leaves it very unclear whether those questioned think that Ontario section 59a provides adequate protection to witnesses in labour board proceedings.

While it is recognized that such a provision has some educative value, it adds nothing in terms of enforcement to the general provision in Ontario section 50 against firing for union activities.

4. CHANGING WAGES AND WORKING CONDITIONS TO UNDERCUT THE UNION

The legislation of Quebec, Saskatchewan, Prince Edward Island and Alberta prohibits any unilateral change in wages and working conditions from the time that an application for certification is made. In other jurisdictions (for example, see section 14(b) of the federal Act and section 59 of the Ontario Act) the changes are only prohibited after notice to bargain has been given. It was the unanimous opinion of labour people that the extended protection was desirable. The protection afforded by such provisions, at whatever stage it commences, was regarded as important and labour opinion was that to delay its effect until notice to bargain had been given was to allow undercutting of the union position at a time when it is most vulnerable. In general, this position was supported by the uncommitted people.

There was one suggestion that such a law is subject to abuse by a union which files application simply to pressure the employer by bringing into effect the prohibition against change.

The general management view was that the protection against changing wages and working conditions should not be extended. In general, it was said that management does not really think it can "buy" employees by improving conditions, and that any such prohibition is therefore unnecessary. The feeling was that such a provision is subject to abuse by unions and can have the effect of making a company economically uncompetitive. Certification

applications may be rather drawn out proceedings, so a prohibition against change, from the time of application, could have a severe effect.

The view was expressed that the result of such change might well be that a company was prevented from making changes that were obviously due. The change could, of course, be effected by gaining the union's consent, but it was felt that to seek the consent would involve a de facto recognition of the union, and that the union would inevitably bargain over the change. This, it was said, would be contrary to the general intention of the Act in that it would, in effect, force an employer to bargain with the union while the union's application for certification was still pending. This objection is met in jurisdictions, such as British Columbia, where the change may be made with Board approval.

5. ABUSE OF CERTIORARI PROCEEDINGS

People interviewed were asked whether in their experience certiorari of labour board certification decisions was often used as a delaying tactic, or as a means of gaining a bargaining counter. The answers indicated a regional difference. This form of abuse was considered by both management and labour people to be practiced in Quebec, Alberta, Saskatchewan and British Columbia, but not elsewhere. With one exception, a counsel whose opinion is worthy of considerable weight, Ontario lawyers did not think this abuse was practiced. They pointed out that certiorari is an expeditious procedure, so that the application cannot be kept hovering for use as a bargaining counter, that costs would make this a poor tactic and that counsel in general would simply not wish to face the court with a clearly spurious case. In Saskatchewan and Alberta, a one-year limitation period was thought to leave room for abuse, and costs were said to be too low to prevent abuse.

Union Unfair Labour Practices

Relevant Legislation

The only union unfair labour practices particularly relevant to the recognition stage are the illegal strike and recognition picketing, which may be carried on in conjunction with or quite apart from such a strike. Sections 23(1) and 24 of the federal Act prohibit recognition strikes. 19/ The Saskatchewan Act does not prohibit recognition strikes but the right to strike at the recognition stage is limited by section 9(2)(b) of the Saskatchewan Act, which makes it an unfair labour practice for any employee or union to counsel or persuade any employee to take part in a strike while an application is before the Labour Relations Board for determination of the majority representative or while any matter is pending before a conciliation board. It is also an unfair labour practice for any union or employee to authorize or take part in a strike until a majority strike vote has been obtained. 20/

Ontario, section 55, provides that no trade union, its officers or agents will counsel, procure, support or encourage such a strike.

The federal Act does not deal expressly with picketing in support of a recognition strike. In contrast, section 3(1) of the British Columbia Trade-unions Act, R.S.B.C., 1960, c. 384, section 43A(3) of the Newfoundland Act, and section 95(2) of the Alberta Act directly prohibit picketing in support of a recognition strike. Ontario section 57(1) provides:

> No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

The full effect of Ontario section 57 is unclear, but it does prohibit picketing in support of a recognition strike.

Section 64(3) of the Alberta Act prohibits the certification of a union if, in the opinion of the Board, membership in or application for membership in the union resulted directly from picketing the employer at the place of business where the employees affected are employed or elsewhere. Section 64(4) provides that, where a collective agreement is negotiated between an employer and a trade union, if recognition resulted directly from such picketing, the agreement is deemed not to be a collective agreement. Improperly obtaining evidence of membership is not prohibited directly, and cannot be considered an "unfair labour practice". It merely invalidates the evidence in question.

General Assessment

There seemed to be a clear consensus that recognition strikes are very rare, that they should be prohibited and that all recognition picketing should be prohibited as well.

Illegal strikes and picketing are more fully discussed in considering union unfair labour practices at the administration stage, where most illegal strikes occur.

1. RECOGNITION STRIKES

With few exceptions, the people interviewed agreed in principle with the outlawing of recognition strikes and with their replacement by certification procedures. A small minority expressed concern over procedural delay in certification and several were of the opinion that recognition

strikes should be considered to be justified by employer unfair labour practices during the organization stage. Recognition strikes were considered rarities, although they are by no means unknown. Here again, the construction industry seemed to be a special case and accounted for a very large proportion of those recognition strikes which had taken place within the experience of the people interviewed.

2. RECOGNITION PICKETING

The view generally held by uncommitted, management and labour people was that recognition picketing should be prohibited even where there was no illegal strike. The consensus seemed, in other words, to be in favour of legislation similar to that of British Columbia and Newfoundland. There was a somewhat lesser consensus that the proper sanction against recognition picketing was injunction and damages. The uncommitted opinion ranged from favouring both sanctions to favouring neither; management people favoured both remedies although several suggested that a special remedy administered by labour relations boards would be more suitable, with which view a considerable number of the labour people agreed. A surprising number of labour people were of the opinion that both injunction and damages should be available, although most of them did not favour the administration of these sanctions by the courts.

3. IMPROPERLY OBTAINING EVIDENCE OF MEMBERSHIP

It was the general opinion of those interviewed that certification procedures would not be improved by making it an unfair labour practice to improperly obtain membership cards and evidence of payment of dues. Management people in British Columbia felt that it would be desirable to create this new unfair labour practice.

D. THE NEGOTIATION STAGE

Management Unfair Labour Practices

Relevant Legislation

The efficacy of the legislation at this stage was considered in relation to the following practices:

1) Failure to bargain in good faith or to make every reasonable effort to conclude a collective agreement. 21/

2) The run-away shop. 22/

3) Changing wages and working conditions to undercut the union. 23/

4) Bargaining with individual employees, which may contravene Ontario section 51(1). In no other jurisdiction is bargaining with "any person" other than the certified bargaining agent expressly prohibited.

General Assessment

The general opinion seemed to be that there was little that the law could or, in the opinion of management people should, do to ensure good faith bargaining. Labour opinion placed more value on legal intervention in the bargaining process, but the prevailing attitude was one of cynicism. Very little thought had been given to the matter it appeared, but the general reaction was that the sophisticated legal standards applied in the United States in enforcing good faith bargaining provisions should not be imported to this country.

1. FAILURE TO BARGAIN IN GOOD FAITH

A breach of the good faith bargaining requirement of the labour relations statutes is, in the words of one of the Newfoundlander's interviewed, "hard to thumb". The difficulty of legislating against this unfair labour practice was unanimously recognized and a majority agreed that the effect of sections 14(a) and 15(a) of the federal Act and its equivalents is simply to cause the parties to put forward an unreal preliminary position in bargaining, so that they may give a superficial appearance of flexibility and thus meet the requirements of the legislation as administered. This was considered to be the case even under the more stringently worded Saskatchewan section.

Labour and Uncommitted Opinion

The general opinion of labour was that in the area of good faith bargaining, legislation could not materially alter the rather dismal situation. This was certainly the view of labour lawyers. Union leaders interviewed, on the other hand, felt that legislation needed strengthening in some way, although they made few constructive suggestions. It was suggested that parties might engage in genuine bargaining with less delay if certain matters, in particular the definition of the unit, were, by law, excluded from bargaining. With a few exceptions, labour people were not in favour of accepting the United States approach to "good faith" which includes a sophisticated classification of bargaining subject matter as "voluntary" or "mandatory". Nor did the majority of labour people think that a "take it or leave it" approach should necessarily constitute an unfair labour practice as it appears to under current United States N.L.R.B. decisions. Uncommitted opinion was very similar to that of the labour people.

Management Opinion

Management generally, and to some extent, labour people, had slight regard for the legal requirements of good faith bargaining, the general opinion being that, at the negotiation stage, the relationship is and should be one of power. Almost no one was in favour of introducing a more sophisticated approach. There were two important dissents from this overall view, by counsel who felt that it was very important to have the "good faith" bargaining section in the legislation because it was useful to them in persuading their own clients to take a reasonable approach.

Should it be Called an Unfair Labour Practice?

Labour people thought that it might help if failure to bargain in good faith appeared under the heading "Unfair Labour Practices" in the legislation, as it does in the Saskatchewan Act. Other people interviewed felt that this formal change should not be made.

Remedies

It was generally agreed that prosecution after consent was particularly unsuitable as the remedy for failure to bargain in good faith. In some jurisdictions, with Acts based on the federal legislation, complaints of failure to bargain in good faith are made to the Minister of Labour who may refer them to the labour relations boards. It appears that in practice the Minister always refers such complaints to the board, which then has power to order the parties to bargain in good faith. Since the parties are already obliged by law to do this, the board orders are considered by many to be superfluous. Some felt, however, that it is useful because, as a general

rule, the parties at least sit down together after receiving such a board order.

Few people gave constructive answers when asked what remedies should be available for failure to bargain. Some labour people suggested heavier fines and there was a suggestion of the award of damages. The prevalent attitude seemed to be that the only real answer to a failure to bargain in good faith was a strike.

Conciliation

Perhaps the most constructive suggestion was that the conciliation officer should be alert to evidence of bad faith and should withdraw immediately upon bad faith evidencing itself, thus permitting concerted action at an earlier time than is generally now the case. The general opinion was that the conciliation officer should not be given the power to penalize a party who is not bargaining in good faith. The exercise of such a power would destroy his usefulness as a conciliator. Many people also felt that conciliation officers are simply not of sufficiently high calibre to be given such power. However, several people interviewed would be willing to see conciliation officers granted greatly increased power if they were upgraded to the status, and possessed the qualifications of, the United States Trial Examiner.

Several leading management counsel felt that compulsory conciliation under Canadian legislation is a desirable alternative to the highly structured approach to "bargaining in good faith" that has developed in the United States system of labour relations. Compulsory conciliation was seen by labour and uncommitted people, on the other hand, as an adjunct rather

than an alternative to the requirement of good faith bargaining. In general there was some faith in the conciliation officer stage although all parties were concerned that the officers are not of high enough calibre.

2. THE RUN-AWAY SHOP

Threats of a run-away shop are an unfair labour practice under section 9(1)(i) of the Saskatchewan Act and section 4(4) of the Newfoundland Act. There has never been a prosecution in Newfoundland and the Saskatchewan provision is not considered to be meaningful by any of the persons interviewed in that province. Generally there was very little concern about the run-away shop.

A handful of labour people in Ontario were in favour of making the run-away shop an unfair labour practice. Some management people were quite certain that "run-aways" were almost non-existent. Others argued with conviction that an employer would never run away unless he were absolutely forced to do so, in which event the law should not sentence him to economic death by ordering him to stay with the union that was killing him. The best view seemed to be that the problem of the run-away shop is part of a broad economic problem and not something that should be dealt with solely as an unfair labour practice.

3. CHANGING WAGES AND WORKING CONDITIONS TO UNDERCUT THE UNION

Opinions on this point have been set out under the heading "C. THE RECOGNITION STAGE; Management Unfair Labour Practices: 4. CHANGING WAGES AND WORKING CONDITIONS TO UNDERCUT THE UNION".

4. BARGAINING WITH INDIVIDUAL EMPLOYEES

It is not at all clear that a contract with an individual employee in conflict with the collective agreement contravenes Ontario section 51(1), which is the only labour relations statute that prohibits bargaining with "any person" other than the certified bargaining agent. Section 10(a) of the federal Act provides even less basis for arguing that contracts with individual employees that conflict with the collective agreement are prohibited. It refers only to "any other bargaining agent".

There was academic opinion to the effect that Ontario section 51(1) does prohibit the "side contract" with individual employees. Labour people generally agreed with this, management people did not and there was marked disagreement on the point among labour relations board personnel interviewed. There was the same disagreement over whether or not it should be an unfair labour practice to make such a contract. The labour opinion was that it should be and management opinion was that it should not be, although there was a significant minority of management people who felt that it should be an unfair labour practice to make a side contract.

There was a similar total lack of consensus on the question of whether, under the Ontario Act, a side contract is binding. Management felt that it was, labour that it was not and the uncommitted people were divided on the question. There was some feeling that such agreements should be binding on the employer, since an employee might have been induced to make special endeavours by such a contract.

Union Unfair Labour Practices

1. FAILURE TO BARGAIN IN GOOD FAITH

The only question here was whether unions ever failed to bargain in good faith, to the extent that they might be proceeded against. The general opinion was that occasionally internal union politics dictate that the union representatives "need" a strike and therefore fail to bargain in good faith. However, it was unanimously considered to be a rare situation. The conclusion is that the requirement of good faith bargaining is of little relevance to the union and no one seemed to feel that it had to be brought home to the union by new legislation.

2. NEGOTIATION STRIKES AND PICKETING

Section 21 of the federal Act prohibits strikes by a trade union entitled to bargain on behalf of a unit of employees until the prescribed conciliation procedure has been exhausted. 24/

Illegal strikes and picketing are more fully discussed under the heading "E. THE ADMINISTRATION STAGE: Union Unfair Labour Practices". Most illegal strikes and picketing occur at that stage of the employer-union relationship.

E. THE ADMINISTRATION STAGE

Management Unfair Labour Practices

Relevant Legislation

The efficacy of the legislation at this stage was considered in relation to the following practices:

1) The exercise of undue influence by management over the union. 25/

2) Discriminatory firing and unfair hiring practices. 26/

General Assessment

Employer domination of union affairs was not considered to be a real problem during the administration stage. Discrimination, especially firing for union activities, is much less a problem of the administration stage than of the organization stage and in that connection it has been fully considered above. The one question peculiar to the administration stage of the relationship is whether labour relations boards should defer to the jurisdiction of arbitration tribunals where their jurisdictions overlap. Generally it was thought that deferral by the boards, or the courts, is desirable, except perhaps where the interests of the person dismissed and the interests of the established bargaining agent are in conflict.

1. UNDUE EMPLOYER INFLUENCE IN UNION AFFAIRS

The unanimous opinion of people interviewed was that, where there is an established collective bargaining relationship, there is no great problem of employers acquiring undue dominance contrary to section 4(1) of the federal Act and its equivalents. The consensus was that such degree of domination was not achieved unless the union had been set up by management in the first place.

In the event that domination contrary to section 4(1) was achieved, the general opinion was that an employee could invoke the law. There was a suggestion that section 65 of the Ontario Act would be an avenue open to

him, but on consideration it is difficult to see what remedy other than consent to prosecute and prosecution would be available. The individual employee thus has some formal remedy, but there seems to be no realistic way for him to attack the situation of employer domination. Few people interviewed considered this to be a problem.

Where a union which has fallen under employer domination was initially given voluntary recognition, section 45a of the Ontario Act provides a means of obtaining termination of the collective agreement, provided the individual employees act within one year. Where the union gained its initial recognition through certification, even this protection is not available. The majority of people, however, felt that the protection afforded to the individual should not be extended, on the grounds that to give him greater recourse to the Board would damage industrial stability. Three people deserving of high respect, one from each of labour, management and the uncommitted group, felt that the exercise of such dominance should continue to be considered an unfair labour practice and be prosecuted as such.

Once again the opinion was expressed that in the construction industry, to allow employees any special recourse to the Board in such cases would be very disruptive of industrial stability.

The general opinion in British Columbia was that the employees are adequately protected against such domination by section 23(4) of the B.C. Act which provides:

> An agreement entered into by a trade union that is not certified shall be deemed to be a collective agreement only if it has been ratified by a majority of the employees affected.

Further protection is provided by regulation 15 of the British Columbia Labour Relations Regulations (55/61) which provided:

> Reg. 15(1) Where an agreement is entered into by a trade union that is not certified, and a copy of that agreement is filed with the Minister under section 24 of the Act it shall be accompanied by evidence of ratification in Form 42 or substantially similar form.
>
> (2) Notwithstanding the provisions of section (1) of this regulation the Chief Executive Officer may seek evidence of ratification of an agreement in any case where it is made to appear to him that such evidence has not previously been filed with the Labour Relations Branch.

The most obvious means that employees have of protecting their interests in such a situation is for them to adhere to another union, which may then become certified during the open season. The Manitoba Act provides somewhat greater protection in this regard than does the legislation of other provinces, and was considered quite adequate by at least one of the uncommitted people interviewed in that province. Section 7(4C) provides:

> Where the Board is of the opinion that the employees in a unit or their employer, or both, would suffer substantial and irremediable damage or loss if it did not entertain an application under subsection (1) [which allows a union claiming as members in good standing a majority of the employees to seek certification during the open season] at a time other than [the open season] , and that it is not reasonable in the circumstances that the employees or the employer, as the case may be, should suffer that damage or loss, an application may be made and considered by the Board at any time.

2. "UNFAIR" HIRING PRACTICES

The unanimous opinion of persons interviewed was that the "yellow dog contract" is no longer a problem, due perhaps to the existing legislation. Discrimination in hiring against known union activists was not considered to be a problem with any importance peculiar to the administration stage.

Management is not prone to hiring "troublemakers", but this was felt to be a fact of industrial life that could not, and perhaps should not, be reached by legislation.

3. FIRING FOR UNION ACTIVITIES AND OTHER DISCRIMINATORY PRACTICES

The general opinion was that this practice does not occur with any significant frequency in the context of the administration of a collective agreement. Only in Quebec were such firings considered to take place with any frequency after certification had been obtained, and there only in the period immediately following certification. The efficacy of the legislation prohibiting discriminatory firing and establishing the remedies for it is discussed above in connection with the organization stage, which is the time when the practice occurs most frequently.

When a man is fired for union activity during the currency of a collective agreement, it is particularly difficult to establish that such was the employer's real purpose. The unanimous opinion of the people interviewed was that nothing more should be done by legislation to guide the labour relations boards or the courts in distinguishing between the employer's primary and secondary, or real and ostensible, purposes. The opinion most commonly expressed was that further sophistication in this matter could best be achieved through a developing labour board jurisprudence, as has been the case in the United States. In Quebec it was felt that no further development was necessary, and there was general satisfaction with section 16 of the Quebec Labour Code which shifts the burden of proof in dismissal cases to the employer. 27/

In Saskatchewan also the onus is shifted by legislation, but the impression was that the treatment of dismissal cases was not substantially affected.

Should Dismissal Cases be Dealt With by the Courts, Labour Relations Boards, or Arbitration?

Where an employee is dismissed for union activity during the currency of the collective agreement, not only does the Minister of Labour, or the labour relations boards, as the case may be, have jurisdiction in a consent application, or under section 65 of the Ontario Act and its equivalents, the matter will probably be arbitrable under the collective agreement as well. It is also possible that the civil courts might take jurisdiction in an action for breach of contract of employment, although this would seem unlikely in the light of Close v. The Globe and Mail (1967), 60 D.L.R. (2d) 105 (Ont. C.A.).

People interviewed were asked whether they thought it desirable that the labour relations boards defer to arbitration in such cases. They were also asked whether dismissal for union activity should be dealt with by the ordinary courts as a breach of the statute or in a contract action. There was a considerable disparity of opinion which cut across the three groups interviewed. The majority seemed to favour arbitration in such cases, and the labour relations board members interviewed were generally in favour of deferring to arbitration, as the Ontario Labour Relations Board now does. The concept of deferring to arbitration appears to be written into the British Columbia Labour Relations Act, in section 22(4)(c)(i). The Quebec Board has no policy of deferring to arbitration in such cases.

Several people spoke in favour of the establishment of a policy of not deferring to arbitration where there is any evidence of collusion against the individual by the union and management. The Ontario Board seems to be moving in that direction. This is a limited alternative to creating either an individual right to take a grievance to arbitration or a duty of fair representation, which are discussed below.

Although arbitration was generally favoured, there was a considerable body of opinion in favour of ensuring in some way that labour relations board pronouncements on the matter of firing for union activities be given general effect by arbitrators. There were several weighty opinions in favour of leaving such matters with the boards entirely, on the basis of their greater expertise and institutional consistency. In the Maritime Provinces and Manitoba particularly there were complaints about the slowness and costliness of arbitration.

In general the opinion was that magistrates were not suitable people to deal with unfair labour practices. It was also felt, although less strongly, that the higher courts should not be involved in the administration of the collective agreement. Some management people were quite in favour of intervention by superior courts, but not by magistrates. Several persons interviewed in the Maritime Provinces pointed out that due to economic conditions magistrates in those provinces are often as competent as superior court judges. Better lawyers are willing to accept appointment.

Union Unfair Labour Practices

Relevant Legislation

The efficacy of the legislation at the administration stage was considered in relation to the following practices:

1) Intimidation and coercion. 28/

2) Strikes during the currency of the collective agreement. 29/ The Saskatchewan Act does not prohibit strikes during the currency of the collective agreement. In addition to the prohibition found in other jurisdictions, Ontario section 55 provides that no trade union, its officers or agents will counsel, procure, support or encourage such a strike.

3) Picketing during the currency of the collective agreement. Section 3(1) of the British Columbia Trade-unions Act, R.S.B.C., 1960, c. 384, section 43A(3) of The Labour Relations Act of Newfoundland, and section 95(2) of The Alberta Labour Act directly prohibit picketing in support of any illegal strike.

Ontario section 57(1) provides:

> No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

The full effect of Ontario section 57 is unclear, but it does prohibit picketing in support of an illegal strike, during the currency of a collective agreement, although it is probably aimed at recognition strikes primarily.

General Assessment

To consider illegal strikes and picketing under the heading "union unfair practices at the administration stage" is to undertake a task that goes well beyond the ambit of what is normally thought of as a consideration of unfair labour practices. The fact remains, however, that almost

all of the illegal strikes in Canada each year are illegal because they occur during the currency of a collective agreement, and such strikes are prohibited by the labour relations legislation of each jurisdiction. A strike that is illegal because it is prohibited by the labour relations legislation is an "unfair labour practice" as we have defined that phrase. Similarly, much illegal picketing is illegal only, or most obviously, because it is in support of an illegal strike. Such picketing is expressly prohibited as an unfair labour practice in three jurisdictions and is rendered illegal in the others by the doctrine of conspiracy in conjunction with the prohibition of the strike.

There was general agreement in principle with the prohibition of strikes during the currency of the collective agreement. The only caveats were entered by a few people who thought that unfair practices by management should be treated as justification for an otherwise illegal strike, particularly where there was danger to health or safety. There was no consensus on whether the courts or the boards should have jurisdiction over this question. There was also a diversity of opinion on the problem of technological change as it affects the legality of a mid-agreement strike.

Views on the efficacy of the various remedies are set out below. Perhaps the two most surprising attitudes revealed were the general high regard for the Ontario Labour Relations Board's power to declare a strike illegal, and the favour with which some labour people worthy of respect looked upon the establishment of a power to enjoin the strike itself.

It was accepted by a majority of the people interviewed that picketing in support of an illegal strike is and should be enjoinable, although the general labour opinion was that there should be some attempt made to determine

whether the picketing was actually directed to furthering the strike rather than simply advertising a cause in the exercise of free speech. One academic and some labour people suggested a "clean hands" doctrine to ensure that management had not precipitated the labour action by unfair practices.

There were a number of thoughtful opinions from all three groups to the effect that what is needed is an armoury of discretionary remedies because flexibility is of the highest importance. The question of which institution ought to have the jurisdiction to issue injunctions is considered in Part A, "GENERAL CONSIDERATIONS", of this chapter.

1. INTIMIDATION AND COERCION

The unanimous opinion was that there is no appreciable amount of intimidation or coercion brought to bear by unions during the administration of the collective agreement. No strengthening of the present provisions. federal section 4(4) and Ontario section 52, for example, was considered necessary to protect individual employees during the administration stage. The principal incidence of such practices occurs at the organization stage, which is considered above. See also Part F below: "Protection of the Individual from Unfair Treatment by the Union".

2. STRIKES DURING THE CURRENCY OF THE COLLECTIVE AGREEMENT

There was virtually no dissent from the general principle that strikes during the currency of the collective agreement should be illegal.

Which Institution to Decide the Legality of Strikes?

Management people interviewed generally felt that the power to declare

a strike legal or illegal, quite apart from the particular remedy that followed, should rest either with the courts or with both the courts and the labour relations boards. If both bodies had the power, as they now do in Ontario, management people were not in favour of making a labour relations board determination of the question binding on the courts. It seemed to sum up the general view when one management person said that what was important was a "judicial legal" interpretation of the law in such matters. The Board, he felt, injected an element of discretion into what was by its nature a legal question. The institution exercising the decision-making power concerned him less than did the nature of the decision. One important management person in Ontario and two management people in the Maritimes favoured transferring the question of legality of strikes to the labour relations boards.

The general, though far from unanimous, view of labour people favoured giving the power to decide the legality of strikes to the labour relations boards. Interestingly enough, dissents from this view included leading labour lawyers in the Maritimes, who felt that the part-time nature of the labour relations boards in the Maritime Provinces made them unsuitable in this regard. Several labour people who favoured giving this jurisdiction exclusively to the boards would do so only on condition that there was provision for review.

The uncommitted people interviewed in Ontario, most of whom were board members, favoured giving jurisdiction to decide the legality of strikes exclusively to the Board, with provision for review by the courts. Two people, one from Ontario and one from Manitoba, thought that this jurisdiction should be given to the chairman or vice-chairman of the labour relations

board sitting alone. Several uncommitted people in the Maritime Provinces, including one labour board chairman, felt that the part-time nature of the boards in that region made them an unsuitable forum for this jurisdiction.

Justification of Illegal Strikes by Unfair Management Practices

The general opinion was against changing the law to allow employer unfair practices to be pleaded in justification of illegal strikes. There were a few dissents by uncommitted people and by management people, surprisingly enough, on this point, and an appreciable number of dissents worthy of considerable respect, by labour people. The general view was that there were legal means of redress for the employer's wrong-doing. The dissenters argued that in power terms dependence on existing means of redress was often unrealistic and allowed employers to use unfair practices to their tactical advantage.

One of the management dissenters mentioned specifically that employer practices which created a health or safety hazard should be considered to justify an otherwise illegal strike.

Technological Change

Those interviewed were asked for their views on the problem of technological change in relation to illegal strikes. This is relevant here because one possible solution to one of labour relations problems of technological change is that the agreement be re-opened for bargaining, which, if it were to be meaningful, would have to include the right to strike.

As might be expected, there was a wide divergence of views. Management opinion was almost unanimous in rejecting any suggestion that the

collective agreement be re-opened for negotiation during its currency because of technological change. Such change was considered to be a management prerogative. Three management people, however, felt that there was a real problem, although they were unwilling to suggest a solution. Only one management person was in favour of re-opening the contract on any basis.

Labour people showed much less unanimity among themselves. The majority favoured the recommendations of the Freedman Report. The Report recommends that the introduction of technological changes must be negotiated. If either party wishes, the matter goes to arbitration, and the arbitrator decides whether or not the change is a material one. The recommendation is that if the change is not material management may introduce it unilaterally. If it is material, the change may not be introduced until the next bargaining period. A considerable body of labour opinion was in favour of a proposal substantially similar, with the difference that where the arbitrator finds the change to be material the agreement is re-opened for negotiation with the possibility of a strike. A lesser number were in favour of compulsory arbitration to settle the terms upon which technological change could be made.

Some labour people said that management should be able to introduce technological changes, unless it was found by an arbitrator that management had acted in bad faith in failing to reveal its plans to the union when the current agreement was negotiated. There were also a few labour people who agreed with the management view, stating that if a union had been so remiss as not to include an appropriate provision in the collective agreement it should not be able to prevent technological changes from being effected.

A slight majority of the uncommitted people interviewed were in favour of not re-opening the agreement under any circumstances. The others preferred the Freedman approach or opening the agreement to negotiation with the possibility of a strike where it was held by the arbitrator that the change was material. Several people, worthy of considerable respect, commented that the problem was a serious one but that they had been unable to settle in their own minds upon a satisfactory solution. One person suggested that the labour relations boards rather than arbitrators be given jurisdiction in such matters.

The Remedies for Illegal Strikes

Detailed questions were put regarding the efficacy and desirability of consent to prosecute and prosecution, declaration of illegal strike, injunctions against the strike itself, damage actions against unions and individuals and refusal of certification as remedies for illegal strikes.

Management and uncommitted people generally felt that section 55 of the Ontario Act, which provides that no union or union officer shall procure, support or encourage an unlawful strike, serves as a useful adjunct to the prohibition of recognition and grievance strikes. These people thought that the section would be improved by an amendment that placed upon union officials the same onus of establishing disassociation with the illegal strike as they bear in Ontario arbitration cases. The onus of establishing disassociation was first imposed by Professor Laskin (as he then was) in the Polymer arbitration decision, (1959) C.C.H. CLLC para. 18,158, at p. 1814; certiorari denied in Re Polymer Corporation and Oil Chemical and Atomic Workers, [1961] O.R. 176, aff'd sub nom Re Imbleau and Laskin, [1962] S.C.R. 338.

Consent to Prosecute and Prosecution

The consensus of opinion was that consent to prosecute granted by the Minister followed by prosecution is not a suitable remedy for illegal strikes. In Ontario, where consent must be had from the Labour Relations Board, this consensus prevailed, although the granting of consent by the Board of itself may operate to end the strike in some circumstances. All parties agreed that when the Minister or Board grants consent, it was highly likely that the magistrate would convict. However, consent to prosecute is seldom used by the leading law firms in Toronto except as part of a package. The union and the striking employees usually receive notice: 1) that an injuction has issued; 2) that the Board has declared the strike illegal and 3) that consent to prosecute has issued. The practice is to serve notice of the declaration and the consent on the individual employees in their homes, which in the case of unsophisticated employees is considered sufficient to frighten them and thus help to end the strike. As a remedy standing alone, management people rejected consent to prosecute as being too slow.

Labour people did not consider consent to prosecute a useful or desirable remedy because it is part of a penal process.

Most uncommitted people felt that consent to prosecute was desirable if it served to warn the strikers that a successful prosecution was about to be launched and thus to induce them back to work.

The consensus among uncommitted and labour people was that consent to prosecute and the subsequent prosecution taken together were not at all desirable remedies. The main objection was to the part played by magistrates,

who were castigated as lacking knowledge in labour matters and hence incompetent to deal with cases in this area. It was generally felt that the criminal aura of the magistrates court made it an unsuitable forum for the settlement of labour matters. Management found the whole procedure too slow.

In jurisdictions where consent to prosecute must be obtained from the Minister of Labour management people objected to the political note thus injected into the proceedings.

Fines

There were some weighty opinions in all three groups to the effect that fines were a desirable remedy for illegal strikes, but that they should be obtainable directly without consent. Management people who favoured fines wished to see them levied by the courts. The labour people wished to see them levied by labour relations boards and this view was shared by the uncommitted people. The general opinion was that the fines set out in labour relations acts are not heavy enough to deter illegal strikes.

Declaration of Illegal Strike

The declaration of illegal strike, available from the Ontario Labour Relations Board pursuant to section 67 of the Ontario Act, was generally considered to be a very useful remedy. In provinces where declaratory jurisdiction is vested in the courts, however, experience has not been happy. People interviewed in provinces other than Ontario, particularly Board members in Quebec, were in favour of giving this jurisdiction to the boards. Management's enthusiasm, naturally, was somewhat limited by the fact that the remedy has no "teeth" and they found the remedy useful only

as an adjunct to others. Its effectiveness in ending strikes was ascribed to the fact that the order was served on individual strikers in their homes. Also, there seems to be little doubt that the declaration is useful to union officers in persuading wildcat strikers to return to work.

Injunctions Enjoining the Strike

On the question of whether an injunction enjoining the strike itself is a suitable remedy for an illegal strike, there was a suprising lack of consensus in all three groups. At the time the survey was taken the Supreme Court of Canada decision in I.B.E.W., Local 2085 v. Winnipeg Builders Exchange (1968). 65 D.L.R. (2d) 242 (S.C.C.), in which an illegal strike was enjoined, had not yet been rendered. There was a lack of consensus on the correctness of the Manitoba Court of Appeal decision, which has now been upheld by the Supreme Court of Canada.

One academic expert suggested that such a remedy would be precluded in Ontario by the operation of the Rights of Labour Act. However, this opinion is open to question because it would appear that such an action could be based on breach of the Labour Relations Act rather than the collective agreement, and might be brought against the strikers named individually or in a representative action.

Several of the most important uncommitted and labour people interviewed felt that only an injunctive remedy, speedily obtainable, could give effect to the legislative prohibition of strikes. But these people generally favoured the exercise of injunctive power by labour relations boards or some newly created labour court. Many management people, of course, agreed that this remedy should be available. but in the ordinary courts. Nevertheless,

a surprisingly large number of management people agreed with the prevalent labour opinion that it was undesirable to give the power to order people to work, even collectively, to any decision-making body.

Damage Actions

There was a general consensus that an action in damages should be available against the union for an illegal strike. Most uncommitted opinion outside Ontario favoured a right of action for damages in the courts. Labour people generally and uncommitted people in Ontario, Manitoba and British Columbia felt that damages should be available through arbitration. Two uncommitted people, worthy of considerable respect, suggested the labour relations boards as the appropriate forum. Management opinion favoured the remedy of damages awarded by the courts, although a minority thought arbitration suitable. It was pointed out by management lawyers that the other remedies are more important in bringing an end to conflict in a given situation but the right to recover damages may be essential to management in marginal industries. It was noted that the damage claim often was used as a bargaining lever subsequent to the granting of an injunction.

There was a consensus that damages should also be available against individuals who participate in an illegal strike. Many uncommitted people, worthy of the highest respect, suggested that fines would be more appropriate against individuals since the amounts involved in a damage judgment might be totally unrealistic. Several influential labour people concurred in this view. One management lawyer who generally had little to say in favour of the Ontario Labour Relations Board felt that the award of damages against individual employees was a proper matter for Board jurisdiction.

Refusal or Revocation of Certification

The general consensus was that refusal of certification or revocation of certification from a union which causes an illegal strike was not an appropriate remedy because it denied the employees the right to the bargaining agent of their choice. A majority of management thought it an appropriate remedy, but there was a significant body of management opinion to the contrary. A number of people who favoured denial of certification as a remedy for striking illegally would place a limit on the time during which the union would be precluded from seeking certification.

3. PICKETING DURING THE CURRENCY OF THE COLLECTIVE AGREEMENT

The Alberta, British Columbia and Newfoundland legislation clearly prohibits picketing during the currency of a collective agreement. Section 57 of the Ontario Act prohibits picketing if a picket "knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike....". Moreover, picketing in support of or in furtherance of an illegal strike is itself illegal as a tortious conspiracy. People interviewed were therefore asked, first, whether they could conceive of any situation in which picketing during the currency of the collective agreement would not be illegal and, second, whether all such picketing should be illegal. It was suggested, for example, that it could be argued that "area standards" picketing is not and should not be illegal.

The uncommitted people interviewed, with one exception, thought that all picketing during the currency of the collective agreement is prohibited by the labour relations legislation in each jurisdiction, and should be.

Management opinion was generally to the same effect, although there were a very few differing views. It was thought that the Quebec and Saskatchewan legislation does not prohibit all such picketing. One management person thought that "area standards" picketing should be allowed.

Several labour people, whose opinions are worthy of considerable respect, agreed that in every jurisdiction a court will now hold any picketing during the currency of the collective agreement to be prohibited. The general opinion, however, was that there could be picketing not directed toward a strike which would not be illegal and enjoinable. Very few of the labour people interviewed thought that all picketing should be illegal simply because there was a collective agreement in force. The free speech aspect of picketing was heavily stressed by the labour people interviewed.

Picketing: The Substantive Grounds Upon Which Injunctions Issue

Assessed broadly, labour and uncommitted opinion was that the grounds upon which injunctions issue are not satisfactory. Management people were generally satisfied, although the most highly sophisticated Toronto practitioners expressed reservations. The objections voiced by the uncommitted and labour people were, in reality, more often directed to the ex-parte procedure than to the substantive grounds upon which injunctions are granted, although several of the uncommitted people objected strongly to "conspiracy" and "inducing breach of contract" as grounds for the issue of injunctions. The reservations expressed by management related to the same economic torts. One important labour spokesman favoured the outlawing of all picketing provided that struck plants were padlocked.

Codification

The people interviewed were asked whether they would find acceptable legislation which declared that, prima facie, all primary situs picketing in support of a legal strike is not enjoinable; and then created a code of exceptions including, for example, trespass, assault and battery, mass picketing, unduly interfering with ingress and egress, and some types of secondary picketing. The difficulty in such legislation would, of course, centre around the definition in a given case of "mass picketing" and "undue interference with ingress and egress".

In this context the institutional issue of what body should have power to issue injunctions becomes very relevant. The suggestion that the initial power to make this decision be given to a field officer did not meet with general approval although variations of the idea received considerable support. See the discussion of opinion on this point under the heading "The Role of the Field Officer or a 'Trial Examiner'" in "General Considerations", Part A of this chapter.

Uncommitted people generally found acceptable the codification set out above. A bare majority of management people and most labour people also favoured this suggestion. However, some uncommitted people whose opinions are worthy of the very highest respect considered the idea to be politically impractical. At least one labour person of similar calibre agreed. The dilemma, in the eyes of these men, is that the only way that labour can effectively make its demands through picketing is by doing acts that are illegal now and that would be illegal under the suggested codification. The effect of the codification would be to make that illegality clearer and it would therefore be unacceptable to labour. This led the labour man to

favour padlocking of struck plants and outlawing of picketing. It led two of the uncommitted people to favour a "muddle through" approach. In support of this view, it must be pointed out that a considerable body of labour people objected to the proposed codification on the grounds of "increased rigidity".

Management's main concern was that the law ensure that workers who wished to do so could cross a picket line.

Secondary Picketing

Management opinion was that all secondary picketing should be enjoinable. Few management people were willing to accept the "ally" doctrine under which picketing of firms closely related through corporate structure or a continuing business relationship should not be considered as secondary. Relatively few people addressed themselves to this problem, but among those who did the labour and uncommitted people generally felt that secondary picketing should be outlawed subject to the "ally" doctrine and other sophistications introduced in the United States jurisprudence on secondary picketing.

F. PROTECTION OF THE INDIVIDUAL FROM UNFAIR TREATMENT BY THE UNION

General Assessment

People generally proved to be concerned about the position of the individual in the collective system. The uncommitted people, most labour people and the most highly specialized management lawyers (who, unlike some of their brothers in less industrialized parts of the country, have accepted a collective approach to industrial relations) balanced their concern for the

individual against the values of retaining a collective system. Deteriorating rank and file union discipline was frequently mentioned in this context.

There was general agreement that there should be a duty of fair representation imposed on unions and that legal means of ensuring that union discipline and expulsion were fair in substance and procedure are needed, but many felt that the unions have been, or could be, moved to make such provision for themselves. Various limitations placed by statute on union power to expel, or, more commonly, on management's obligation to dismiss after expulsion, were found generally acceptable.

1. DUTY OF FAIR REPRESENTATION

People interviewed were asked whether there is any basis for saying that in Canadian law there is an enforceable legal duty of fair representation owed by the recognized bargaining agent to all persons in the unit. Is there a right of action, in other words, by an individual employee against the union if it has failed to act in good faith in refusing to press his grievances or to negotiate on his behalf?

The general opinion of uncommitted people is that there is probably no such duty, but that such a duty should be owed. Uncommitted people generally felt that the labour relations boards would be the proper institution to enforce such a duty, and they did not feel that the creation of such a duty would swamp the arbitration process or the boards. The right of complaint should arise only after the union had failed to act upon proper application and a union would only be held liable for failing to act in good faith. However, several uncommitted people, whose opinions are

worthy of the very highest respect, were not in favour of the creation of such a duty by legislation. They were concerned that the enforcing institution, be it the labour relations board or the courts, would be swamped by "crank" cases.

Three uncommitted people and a number of labour people, including several whose legal opinions cannot be taken lightly, thought that there is already a legal duty of fair representation which would be enforced in the appropriate case. Several management people agreed. Such a duty was said to be implied from the fact that the employee's inherent right to bargain for himself is given over to the union under labour relations legislation. Most management people thought that there is no such duty.

Labour people generally thought that there should be a duty of fair representation and, except in the Maritimes, they favoured the labour relations boards as the enforcing institution. It was thought that with normal protection through award of costs, the arbitration and board mechanisms would not be swamped as a result of the creation of this duty. The consensus of management opinion was also in favour of the creation of such a duty although there was more concern expressed by this group over the swamping of legal processes and the processes of arbitration. Generally management people favoured the courts as an enforcing institution.

Several people in each group expressed concern for deteriorating union discipline, which they felt might be further harmed by the creation of a legal duty of fair representation.

2. INDIVIDUAL RIGHT TO CARRY GRIEVANCES TO MANAGEMENT AND ARBITRATION

In several jurisdictions a right of personal grievance is already protected by legislation. For example, section 26 of the federal Act provides "notwithstanding anything contained in this Act, any employee may present his personal grievance to his employer at any time". Where such provisions are in effect there was no complaint about their operation. There was some suggestion that under Quebec law an individual employee could, if he wished, process his grievance through arbitration. although no instance of this having happened could be recalled.

It was generally thought by uncommitted people that grievances should be carried to management through the union. Much more strongly held was the view that the individual should not be allowed to invoke arbitration. Several people suggested that there should perhaps be some provision for individual process if a duty of fair representation were not established, but uncommitted people generally favoured the duty of fair representation as a means of protecting the individual in the collective system. There were a few uncommitted people who favoured an individual right to process through arbitration, with adequate protection against "cranks" provided by the awarding of costs.

Labour people generally were not in favour of an individual right to grieve, and it was suggested that such a right is inconsistent with the theory of collective bargaining. Labour people interviewed in Quebec, however, felt that although such a right is not spelled out in the Code it does exist in that province and raised no objections. Labour people generally felt even more strongly that there should be no individual right to

proceed to arbitration, but there were a few who would not object to such a right being granted, provided that protection was afforded by the awarding of costs against an unsuccessful grievor.

The majority of management people were in favour of creating an individual right to process grievances through arbitration but the most highly specialized and sophisticated management lawyers were not in favour of such a right. Management people generally accepted that there was an individual right to present grievances to management.

3. LEGAL INTERVENTION IN THE INTERNAL AFFAIRS OF UNIONS

There was a consensus, but by no means a unanimity of opinion, that greater protection should be afforded to the interests of individual union members by legislation that creates new unfair labour practices concerned with internal union affairs. Such legislation would be aimed at preventing discipline or expulsion on grounds unfair in substance or procedure. Uncommitted opinion was generally in favour of greater intervention although there were some very weighty opinions to the contrary. Several people expressed the view that it would be highly desirable to encourage unions to establish public review boards modelled on the United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) plan.

Most labour people, surprisingly enough, said that if the unions do not make adequate provision they would be in favour of increased intervention to protect individual rights. This was far from a unanimous view, however, and several of the most highly respected labour lawyers rejected increased intervention. Management people were generally in favour of increased intervention, but, surprisingly once again, some of the most highly

respected people felt that the present degree of legal intervention was sufficient. The most highly sophisticated people in each group seemed very concerned with the crisis in internal union discipline which, they thought, would be aggravated by this type of legal intervention.

There was general agreement that section 35(2) of the Ontario Act is desirable. Section 35(2) provides that no employer shall discharge an employee who is denied union membership because he is a member of another union. Section 6(2) of the federal Act is narrower than Ontario section 35(2) in that it only declares invalid a provision in a collective agreement which provides that an employee must be dismissed for dual unionism. It, therefore, does not cover the case where the employer does discharge a dissident employee at the request of the union although there is no collective agreement provision requiring the employer to do so. Section 6 of the Prince Edward Island Industrial Relations Act, and section 5A of the Newfoundland Labour Relations Act go farther, and appear to outlaw the closed shop.

With several notable exceptions, the labour people interviewed would not wish to see section 35(2) and its equivalents extended to outlawing of the closed shop. One labour lawyer who did generally favour the outlawing of the closed shop modified his view by stressing that the retention of the closed shop is essential in the construction industry. Management people were divided on the closed shop question, but certainly favoured the present Ontario section 35(2). Uncommitted people also favoured the present Ontario section 35(2) but generally were not in favour of legislation outlawing the closed shop. A few uncommitted people suggested that the "Rand Formula" should be legislated into every collective agreement.

Section 58a of the Ontario Act provides:

> No trade union shall suspend, expel or penalize in any way a member because he has refused to engage in or to continue to engage in a strike that is unlawful under this Act.

It was generally considered that loss of membership for refusal to participate in an illegal strike could found a cause of action in the courts quite apart from legislation. Section 58a was therefore considered to be merely a codification but the majority of the people interviewed were in favour of its inclusion for its educative value. A large number of labour people did not concur in this.

The view was expressed that Ontario section 58a, in protecting the employee's right to union membership, provided a much more valuable protection than do sections that merely protect the right to employment.

Management people generally favoured the extension of protection of union membership by legislating against expulsion on other grounds, in addition to refusal to strike illegally, but few were able to give examples of grounds of expulsion that they thought should be prohibited. Two people suggested that refusal to participate in a legal strike should be prohibited as a ground for expulsion. Uncommitted people were divided on the matter of extending the bases upon which expulsion was prohibited and labour people were generally not in favour of extending the grounds beyond refusal to participate in an illegal strike.

Section 32(3) of the Saskatchewan Trade Union Act goes beyond Ontario section 58a and prohibits expulsion for non-payment of discriminatory levies. This is coupled with the legislative enactment of a "maintenance of membership" provision which is to be included in any collective agreement at the

request of the union representing the majority of employees. Section 32(3) provides:

> Where membership in a trade union or labour organization is a condition of employment and:
>
> a) Membership is not available to an employee on the same terms and conditions generally applicable to other members; or
>
> b) An employee is denied membership or his membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessments and initiation fees uniformly required to be paid by all other members of the trade union as a condition of acquiring or retaining membership:
>
> the employee, if he tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership:
>
> c) Shall be deemed to maintain his membership for purposes of this section; and
>
> d) Shall not lose his membership for purposes of this section for failure to pay any dues, assessment and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members.

No objection was taken to the operation of these provisions.

Labour people were not in favour of a "conscientious objector" provision that would allow an employee to escape his obligation under the collective agreement to pay union dues by paying an equivalent amount to charity. Management people felt the question was not an important one, and divided on the answer. Uncommitted people were generally not in favour of such a provision, although there were weighty dissents.

4. PROHIBITION OF THE USE OF DUES FOR POLITICAL PURPOSES

Labour people were not in favour of a provision, such as that included

in the British Columbia legislation, which prohibits the use of union dues to support a political party. Management people split on the question and the uncommitted people were generally in favour of such a provision, although there were a considerable number of dissents from this view. It was claimed by many people in British Columbia that the section did not prevent unions from achieving the same ends by other means.

REFERENCES

1/ Fed. - Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c.152.

Alta. - The Alberta Labour Act, R.S.A. 1955. c.167, Part V, Labour Relations; as amended by 1957, c.38: 1958, c.82: 1959, c.35: 1960, c.54; and 1964, c.41.

B.C. - Labour Relations Act, R.S.B.C. 1960. c.205: as amended by 1961, c.31; and 1963, c.20.

Man. - The Labour Relations Act, R.S.M. 1954, c.132: as amended by 1956. c.38: 1957, c.36: 1958, (1st session), c.29: 1959, (2nd session), c.32; and 1962, c.35.

N.B. - Labour Relations Act, R.S.N.B. 1952, c.124; amended by 1953, c.21: 1956. c.43: 1959, c.56: 1960, c.45, 1961, c.52: and 1966. c.73.

Nfld. - The Labour Relations Act, R.S.N. 1952, c.258, as amended by 1959, No.1: 1960, No.58: 1963, No. 82: 1966, No. 39.

N.S. - Trade Union Act. R.S.N.S. 1954, c.295: as amended by 1957. c.53: 1964, c.48; 1965. c.53.

Ont. - The Labour Relations Act, R.S.O. 1960. c.202: as amended by 1961-62, c.68: 1962-63. c.70: 1964, c.53: and 1966, c.76.

P.E.I. - The Industrial Relations Act, S.P.E.I. 1962. c.18: as amended by 1963, c.20: 1966. c.19: and 1966. (2nd session). c.3.

Que. - Labour Code, R.S.Q. 1964, c.141; as amended by 1965, c.14: and 1965. c.50.

Sask. - The Trade Union Act. R.S.S. 1965. c.287: as amended by 1966 c.83.

2/ See also: Alta. ss. 77, 80; B.C. s. 4(2); Man. s. 4(2). (3): N.B. s. 3(2), (3); Nfld. s. 4(2), (3): N.S. s. 4(2). (3): Ont. s. 50: P.E.I. s. 4(2). (3): Que. s. 13; Sask. s. 9(1)(a).(e).(f).

3/ See: Fed. s. 40; Alta. s. 80(1), s. 126: B.C. s. 7(1), s. 57(1): Man. s. 43(1): N.B. s. 38; Nfld. s. 41; N.S. s. 42 Ont. s. 69; P.E.I. s. 54. 56; Que. s. 125; Sask. s. 13.

4/ See: Fed. s. 46(1): Alta. s. 125(1): B.C. s. 85: Man. s. 47(1): N.B. s. 44(1): Nfld. s. 47(1): N.S. s. 46(1): Ont. s. 74(1): Que. s. 131: Sask. s. 13(3).

5/ See also: Alta. s. 76(1); B.C. s. 4(1); Man. s. 4(1); N.B. s. 3(1); Nfld. s. 4(1); N.S. s. 4(1); Ont. s. 48; P.E.I. s. 4(1); Que. s. 11; Sask. s. 9(1)(b).

6/ See: Man. s. 4(4); N.S. s. 4(5); Ont. s. 48; Sask. s. 9(1)(a).

7/ See also: Alta. ss. 61, 63; B.C. s. 12; Man. s. 9; N.B. s. 8; Nfld. s. 9; N.S. s. 9; Ont. s. 7; P.E.I. s. 16; Que. ss. 20, 22, 24, 25; Sask. s. 7.

8/ See also: Alta. s. 64(1), (2); B.C. s. 12(8); Man. s. 9(5); N.B. s. 8(5); Nfld. s. 9(5); N.S. s. 9(6); Ont. ss. 10, 36; P.E.I. s. 16(7).

9/ See also: Alta. s. 77(2)(b); B.C. s. 4(2)(b); Man. s. 4(2)(b); N.B. s. 3(2)(b); Nfld. s. 4(2)(b); N.S. s. 4(2)(b); Ont. s. 50(b); P.E.I. s. 4(2)(b); Que. s. 13; Sask. s. 9(1)(f).

10/ See Chapter IV, A Follow-up Study of "Section 65" Cases in Ontario.

11/ See: B.C. s. 7; Man. s. 6A; N.S. s. 40; Ont. s. 65.

12/ See the federal Act, ss. 44 and 56; see the Newfoundland Act, ss. 45 and 54.

13/ See the federal Act, ss. 40 and 46; see the Newfoundland Act, ss. 41 and 47.

14/ See: Fed. s. 4(4); Alta. s. 80(1)(c)(iv), (3); B.C. s. 6; Man. s. 4(3); N.B. s. 3(3); Nfld. s. 4(3); N.S. s. 4(3); Ont. s. 52; P.E.I. s. 4(3) and 5(3); Que. s. 12; Sask. s. 9(2)(a).

15/ See: Fed. s. 5; Alta. s. 80(5); B.C. s. 5(1); Man. s. 5; N.B. s. 4; Nfld. s. 4(7); N.S. s. 5(1); P.E.I. s. 5(1); Que. s. 5.

16/ See: Fed. s. 4(3), (4) and its equivalents, which are set out under the heading "B. THE ORGANIZATION STAGE; Management Unfair Labour Practices: Relevant Legislation", earlier in this chapter.

17/ See: Alta. s. 120; Ont. s. 59a.

18/ See: Alta. s. 79; P.E.I. s. 15(2); Que. s. 47; Sask. s. 9(1)(j).

19/ See also: Alta. ss. 69, 94(4), (5); B.C. s. 12(9); Man. s. 24; N.B. ss. 22(1), 23; Nfld. ss. 24(1), 25; N.S. s. 24(1); Ont. ss. 54(2), 55; P.E.I. s. 40(1); Que. s. 94.

20/ See: Sask. s. 9(2)(d).

21/ See: Fed. ss. 14(a), 15(a); Alta. ss. 55(1)(a), 72(7)(a), (8); B.C. ss. 18(a), 19(a); Man. ss. 14(a), 15(a); N.B. ss. 13(a), 14(a); Nfld. ss. 14(a), 15(a); N.S. ss. 14(a), 15(a); Ont. s. 12; P.E.I. ss. 19, 21(a); Que. s. 41; Sask. ss. 2(a), 9(1)(c).

22/ See: Nfld. s. 4(4): Sask. s. 9(1)(i).

23/ See: Fed. ss. 14(b), 15(b): Alta. s. 94(1)(c); B.C. s. 18(b): Man. ss. 14(b), 15(b); N.B. ss. 13(b), 14(b); Nfld. ss. 14(b), 15(b): N.S. ss. 14(b), 15(b); Ont. s. 59(1): P.E.I. s. 21(b): Que. s. 47: Sask. s. 9(1)(j), (m).

24/ See also: Alta. s. 94(1), (5): B.C. s. 45: Man. s. 21: N.B. s. 20: Nfld. s. 22, N.S. s. 21: Ont. s. 54(2): P.E.I. s. 38: Que. ss. 42, 43, 46: Sask. s. 9(2)(b).

25/ See: Fed. s. 4(1) and its equivalents, which are set out under the heading "B. THE ORGANIZATION STAGE: Management Unfair Labour Practices: Relevant Legislation", earlier in this chapter. Section 45a of the Ontario Act, which makes special provisions for termination of the certification rights of an employer dominated union, is relevant to the practice of exercising undue influence.

See also: Man. s. 11(2); Nfld. s. 11(1)(b).

26/ See: Fed. s. 4(3) and (4) and its equivalents, which are set out under the heading "B. THE ORGANIZATION STAGE: Management Unfair Labour Practices: Relevant Legislation", earlier in this chapter.

27/ See Que. s. 16 set out under the heading "B. THE ORGANIZATION STAGE: Management Unfair Labour Practices: 4. REFUSAL TO HIRE, DISCRIMINATION, THREATS AND FIRING FOR UNION ACTIVITIES", earlier in this chapter.

28/ See: Fed. s. 4(4) and its equivalents, which are set out under the heading "B. THE ORGANIZATION STAGE: Union Unfair Labour Practices: Relevant Legislation" earlier in this chapter.

29/ See: Fed. s. 22(1)(b), Alta. s. 95: B.C. 46(2): Man. s. 22(1)(b): N.B. s. 21(1)(b): Nfld. s. 23(1)(b): N.S. s. 22(1)(b): Ont. s. 54(1): P.E.I. s. 39(1)(b): Que. s. 95.

CHAPTER III

A COMPARATIVE STUDY OF THE RELEVANT UNITED STATES FEDERAL LABOUR LAW

A. NATURE AND PURPOSE OF A COMPARATIVE STUDY OF UNITED STATES EXPERIENCE

Under the terms of reference, related to the study of unfair labour practices, a study was undertaken of unfair labour practices as they are established under the federal labour statutes of the United States. There are a number of valid reasons for examining the United States statutes and their administrative and judicial treatment.

Firstly, many of the unfair labour practices found in Canadian labour statutes had their origins in the National Labor Relations Act, (Wagner Act) 1/ as amended by the Labor Management Relations Act, 1947 (Taft-Hartley Act) 2/ and The Labor-Management Reporting and Disclosure Act of 1959. 3/ Furthermore, many particular abuses legislated against in the United States statutes are not unlike those found in their Canadian counterparts.

Secondly, the origins of labour board jurisdiction over unfair labour practices, including the power to fashion remedies, is found in the United States statutes. 4/ In a number of Canadian jurisdictions, statutory amendment has created varying degrees of jurisdiction over unfair labour practices to be vested in labour boards.

While the above-mentioned considerations provide an immediate basis for an examination of the United States experience, there are additional grounds upon which such a study is justified. The economic and social relationships existing in the labour management context are not markedly different in Canada and the United States. In fact, the experience of the writer was that there was an apparent greater degree of similarity in the economic and social conditions existing in New York State and the Provinces of Ontario and British Columbia than between the provinces of Ontario and British Columbia and certain other of the provinces. Many international companies conduct operations both in Canada and the United States, which leads to an awareness and often an involvement on the part of labour and management in a variety of common problems.

In undertaking to conduct a study of the present state of the federal United States law, field studies were carried out mainly in the States of New York and California.

Regional Directors of the National Labor Relations Board, (hereinafter called the N.L.R.B.) were interviewed in Brooklyn, N.Y. and Los Angeles, California. The functions of the regional offices in unfair labour practice cases were discussed in their substantive and procedural aspects. Of particular interest was the part played by the General Counsel of the Board in the receipt of unfair labour practice charges and in the disposition of such charges, either by issuing or refusing to issue a formal complaint, following attempts at settlement and through the various stages of the trial of the unfair labour practice issue leading to the ultimate disposition of the complaint by enforcement or dismissal. 5/

In addition meetings were arranged, by the Regional Directors, with the Regional Attorneys, in order to obtain a better understanding of the

role of the Regional Attorneys and their staffs of Attorneys in appearing before the Board in the prosecution of unfair labour practice cases.

Through the cooperation of Regional Attorneys, an opportunity was afforded to meet with a number of the Attorneys on their staffs, who were charged with investigating and litigating unfair labour practice cases, before a trial examiner. 6/

A number of useful meetings were held with prominent United States labour lawyers, representing both labour and management, as well as prominent labour law teachers. At these meetings valuable information was obtained as to the experience of lawyers in dealing with federal unfair labour practice cases. Observed deficiencies in the legislative provisions and their administration were examined, on the basis of the lawyer's actual experience, and a number of proposals were made for legislative reform.

It is interesting to note that those United States lawyers and Board personnel who were interviewed often manifested some familiarity with the Canadian labour laws, although in no case was this knowledge by any means profound. This fact is contrasted with the situation in Canada where the labour lawyers interviewed were generally less well informed about the corresponding United States labour jurisprudence. Whether this lack of knowledge should be cause for concern is debatable. However, from a Canadian point of view, it would seem to be, since so many labour-management problems emerge first in the United States and subsequently arise in a Canadian context. There is every reason to suggest that an informed examination of the United States legislative, judicial, arbitral, bargaining and scholarly experience in newly emerging areas of concern would be of value when dealing with similar matters in Canada. Of particular interest

are the areas of the growth of the arbitral process as a forum for determining matters involving unfair labour practices, and the relation between the arbitrator's awards in such cases, the N.L.R.B. and the courts. Problems of bargaining over effecting changes brought about by sub-contracting and automation as well as the entire area of internal union affairs, treated by Title I of the Labor-Management Reporting and Disclosure Act of 1959, (Landrum-Griffin Act) the so called "Labor Bill of Rights" 7/, represent other fruitful areas for comparative study.

B. UNITED STATES PROCEDURE IN THE PROCESSING OF AN UNFAIR LABOUR PRACTICE CASE

A brief description of the handling of an unfair labour practice case in the United States will serve to establish the differences between their concept of the treatment of unfair labour practices and those existing in Canada.

Firstly, there is no United States counterpart of the Canadian statutory provisions whereby the commission of an unfair labour practice is considered to be a form of quasi-criminal offence. Proceedings for the obtaining of consent to prosecute, based on the alleged commission of an unfair labour practice and leading to a trial before a magistrate, are alien to United States labour law. When the United States labour lawyers interviewed were informed of such Canadian laws and their treatment in magistrates' courts in a manner comparable to a criminal proceeding, with the various attributes of a criminal offence, they expressed uniform amazement that such laws persisted. United States labour policy, which appears to have general acceptance, is that unfair labour practices should not be treated as quasi-criminal offences. To do so, it was suggested, would be

to create an unrealistic burden of proof, an atmosphere unconducive to the settlement of disputes, and the imposition of a forum presided over by a judicial officer generally unsuited to dealing with labour law problems. This view, of course, corresponds to the generally expressed opinions of Canadian lawyers.

Enforcement of the unfair labour practice sections in the United States federal labour statutes and the fashioning of remedies where breaches are held to have occurred are initially dealt with through the agency of the N.L.R.B., its officers and functionaries. 8/ There is, therefore, a degree of similarity between this approach and that which is provided for in the Provinces of Ontario, Manitoba, Saskatchewan, British Columbia, Nova Scotia and Quebec 9/, as an alternative in certain cases to prosecution of alleged violations before a magistrate.

Responsibility for the conduct of unfair labour practice cases before the boards of the several Canadian provinces having jurisdiction in such matters is placed directly on the parties. In contrast, the United States legislation provides that the General Counsel of the Board, through his staff of investigators and attorneys, shall investigate and prosecute cases on behalf of the aggrieved parties who have filed charges. 10/ This does not relegate the charging party's lawyer to the role of passive observer and he may appear and participate in the proceedings along with the attorney representing the General Counsel. 11/ It should be noted that the General Counsel was made independent of Board supervision by the Taft-Hartley amendments so the Board serves in a judicial capacity only. 12/

Briefly stated, the N.L.R.B. staff and attorneys under the supervision of the General Counsel are empowered to investigate unfair labour practice

charges filed by aggrieved parties. If the charge has merit, a complaint will be issued by the Regional Director acting on behalf of the General Counsel and directed to the party alleged to have committed the unfair labour practice. 13/ If settlement cannot be reached, the issue will then be delegated to a field attorney representing the General Counsel as above outlined. This approach is in sharp distinction to Canadian board proceedings involving the trial of unfair labour practice cases, where applicable in Canada. There is provision under Section 65 of The Labour Relations Act of Ontario for investigation of the alleged breach by a field officer of the Board who will similarly attempt to achieve a settlement of the matter between the parties 14/, but if such investigation discloses evidence of a violation, the Board is not empowered to provide the complaining party or his solicitor with the evidence obtained in the course of the investigation (Section 83(3)). 15/ Furthermore, in no Canadian jurisdiction does the board or any governmental agency act through solicitors employed by them in prosecuting the complaint.

At this point it should be stated that, while a significant majority of those Canadian labour lawyers interviewed were favourably disposed to labour board disposition of unfair labour practice cases as opposed to prosecutions, only a minority favoured the United States approach to investigation and the conduct of litigation in unfair labour practice cases. It is germane at this stage to briefly examine the basis for such attitudes.

A substantial majority of labour lawyers in Canada and the United States readily acknowledged the difficulties of proving the commission of unfair labour practices by a sophisticated employer. It is somewhat unrealistic to expect an employee, caught up in a situation where a union and an employer are pursuing their apparently antagonistic interests, to

display untoward bravery which might result in the loss of his employment. Moreover, unfair labour practices are not often conducted with such a lack of finesse that it is easy to obtain evidence in support of an unfair labour practice charge. Statutory protection for witnesses in board proceedings, while necessary, cannot, in the estimation of many labour lawyers, serve more than a mildly salutary effect. A variety of means can be employed to subsequently punish an uncooperative employee, as by noting violations of work rules of a minor nature which otherwise would be overlooked.

There was fairly universal agreement among Canadian lawyers that, all other concerns being set aside, a higher proportion of orders would be obtained in unfair labour practice proceedings before boards if investigation were conducted by the board or other governmental agency and if the evidence obtained was furnished to the complainant. The reasons for such conclusions are fairly obvious. Many complainants lack the resources with which to conduct a thorough investigation, problems of interviewing potential witnesses are aggravated by lack of access to company property, and the reticence of employees is far more pronounced where information is being elicited on behalf of one of the parties directly involved in the proceedings.

Nevertheless, only a minority of Canadian lawyers expressed a desire to have the United States procedure, or a variation thereof, introduced in Canada. Many management counsel felt the extent of the problem is not so great as to warrant a departure from established practice. Concern was also expressed that the United States procedure would require a considerable expansion in the number of board personnel, imposing an unnecessary burden on the taxpayer. Some respondents, familiar with United States experience,

made reference to the fact that the percentage increase in breaches brought to light would not justify the introduction of the United States system. United States respondents acknowledged that, even with improved and expanded investigatory techniques, there still remained the problem of obtaining evidence of unfair labour practices committed by sophisticated employers.

Perhaps the most important argument raised against the United States system was expressed by those lawyers who were concerned about the independence of the board once the government injected itself into the proceedings as a participant. Traditional concepts of the fundamental nature of proceedings before administrative tribunals, and an adherence to traditional adversary concepts, caused many lawyers to be concerned about casting the Board into the role of both "judge" and "prosecutor".

Since the enactment of the National Labor Relations Act, United States management counsel, particularly, have questioned the practice of governmental interventions in the prosecution of unfair labour practice cases. The frankly political aspects of N.L.R.B. conduct of the matters within its jurisdiction has exacerbated management attitudes toward the Board and its handling of unfair labour practice cases and this, no doubt, has been compounded by having to cope with Board investigations of charges and subsequent prosecutions of cases. (But see steps taken to separate the General Counsel from Board supervision post.) 16/ It was therefore a somewhat unexpected result to find most United States respondents to be of the opinion that the Board investigators and attorneys brought to their task a high degree of dedication and a surprising amount of impartiality. Board personnel, their selection, training and functions are considered below.

With the creation of union unfair labour practices in 1947 by the Labor Management Relations Act, the unfair labour practices jurisdiction of the N.L.R.B. ceased to be one-sided and Board attorneys now regularly appear on complaint proceedings instituted by both union and management. 17/ There is also, perhaps, some significance in the fact that, in 1966, only 6% of unfair labour practice cases resulted in Board orders. 18/ Management lawyers tended to acknowledge that, especially in cases involving intimidation and coercion, the issuance of a complaint by the Board was not to be taken lightly, for complaints are not issued as a matter of course. Hence the considerable degree of success in achieving accommodation.

Whatever the merits of the United States investigatory and prosecution procedures, there must be a careful assessment of the seriousness of the evil to be dealt with and even if it is deemed sufficient to warrant remedial legislation, each jurisdiction must carefully consider the price to be paid in increased administration costs, incidental administrative problems of staff selection, training, supervision and increased bureaucratic administration. Furthermore, the United States procedure is very slow when judged by Canadian standards. 19/ At the same time it must be remembered that the modern Canadian labour legislation represents a departure from the traditional treatment of labour management relations and at each juncture where United States ideas were borrowed and reshaped to accommodate themselves to Canadian conditions, interested persons and bodies voiced similar misgivings. Even as late as 1965, when the Province of Manitoba was considering the enactment of legislation to create unfair labour practice jurisdiction in the Manitoba Labour Board (since adopted) 20/, the old arguments that accompanied the introduction of such legislation in the United States, Ontario, British Columbia and Saskatchewan were resurrected in briefs submitted to the Woods Committee. 21/

C. THE TRIAL EXAMINER

As is the case of Ontario, Manitoba, British Columbia and Quebec, there is under the United States federal labour statutes a policy favouring accommodation of unfair labour practice cases. In the United States, the first hearing of the issues to be determined takes place before a quasi-judicial officer known as a trial examiner, rather than before the N.L.R.B. itself. Throughout the course of the trial before the trial examiner the possibility of settlement is a continuing consideration.

With an extremely large volume of unfair labour practice cases coming before the N.L.R.B. and with only a single Board for the entire United States (in so far as the federal labour field is concerned) it would be impossible for the N.L.R.B. to adjudicate upon every case. It was therefore necessary to provide a means of having unfair labour practice cases heard, at least in the first instance, by some other means than before the full Board or even before separate Board panels. It was through the creation of a Trial Examiner's Division that this was accomplished. The examiners are independent of both the General Counsel who is charged with prosecuting the case (whose functions are to be referred to later in this section) and of the N.L.R.B. Trial examiners are appointed by the Board 22/ and each hearing is before a trial examiner selected by the Chief Trial Examiner in Washington or his Associate in San Francisco and sent to the region where the parties reside. 23/ As a further attempt to ensure the independence of trial examiners they are appointed, in effect, for life and are removable only after a hearing before the Civil Service Commission. They act solely in a judicial capacity, render the initial decision and are not further involved with the disposition of cases heard by them, or by the Board that deals with appeals from their decisions. 24/

Persons wishing to serve as trial examiners are subjected to a rigorous screening process. Applicants are required to pass a series of oral and written tests intended to provide an indication of their understanding of the relevant legislation and case law as well as their ability to serve in the capacity of a quasi-judicial officer. The applicant's experience in administrative law is also a factor in the process of selection. Applicants who are successful (usually about twelve) are placed on a list maintained by the Civil Service Commission of those eligible for appointment to the Trial Examiner's Division. On appointment by the Board, they have the highest civil service rating of GS 16. Their salary is from $20,000 to $25,000 per year. 25/

Although it is not mandatory, most trial examiners are lawyers and there has been periodic pressure, from the American Bar Association, Labor Law Section, to make it a requirement that trial examiners be lawyers.

Those United States labour lawyers who were interviewed, while critical of certain aspects of the Trial Examiner's Division, were in substantial agreement that trial examiners brought to their task a considerable degree of dedication, expertise and impartiality. There was also general agreement that there was an advantage in having unfair labour practice cases heard, at least in the first instance, by persons possessing an expertise developed over a period of time through continuous association with the legal and socio-economic problems often unique to the area of labour management relations.

None of those interviewed suggested a lack of independence on the part of trial examiners. In fact the opposite was suggested, in that it was often as difficult to have the examiner render his decision speedily as it

was to similarly influence a judge. The consensual view was that the institution, while considered to be the appropriate forum for litigating unfair labour practices should, nevertheless, be re-assessed constantly with a view to its improvement. 26/

Because of the shortcoming attributed to tri-partite Canadian Labour Boards, particularly in provinces where the board is chaired by the Deputy Minister of Labour, and in some cases, where the board is part-time, a trial examiner system interested a number of Canadian lawyers. The reservations maintained by most Canadians interviewed about the introduction of trial examiners into Canada may be summarized thus:

1) Apart from Ontario and British Columbia, it was felt that because of the lack of population density and a high rate of industrialization, such a major structural change was not warranted.
2) It was feared that it would not be possible to attract persons who were of sufficiently high calibre to overcome initial resistance to such change.
3) Some fear was expressed that the expense involved in paying trial examiners the relatively high salary the position would command would create a precedent which might have an adverse effect upon civil service salary negotiations.
4) Although the United States trial examiner's report, in cases where no exceptions are filed to it, becomes the order of the Board 27/, some Canadian lawyers expressed concern over possible constitutional bars to the provincial appointment of trial examiners.

5) Some lawyers questioned the degree of independence which a trial examiner could bring to his task if he were classified as a civil servant.

6) Some fear was expressed that time delays in unfair labour practice cases, which are considerably greater in the United States than in Canada, would be imported with the system of trial examiners.

7) Some management lawyers favoured placing the entire field of unfair labour practices within the existing superior court system. Not only did they disapprove of the introduction of a trial examiner system, but they also were critical of the board being given greater judicial powers.

In the case of overburdened boards there would, no doubt, be many advantages in a trial examiner system. Nevertheless, the consensus of Canadians interviewed is that the present system is workable and satisfactory, subject to the expressed need for upgrading qualifications and the rationalizing of procedure before the boards through the development of a board jurisprudence and an up to date statement of rules for proceeding before boards.

It must be appreciated that part of the explanation for the large backlog of cases before the N.L.R.B. 28/ necessitating some system of trial apart from the Board, is attributable to the expanded unfair labour practices jurisdiction of the N.L.R.B., which includes, for example, illegal strikes and picketing.

D. EXPANDED NATIONAL LABOR RELATIONS BOARD JURISDICTION; THE ROLE OF THE COURTS; THE ROLE OF ARBITRATION

Cases involving secondary boycotts and other forms of secondary pressures, recognition picketing and good faith bargaining are dealt with by the N.L.R.B. as part of its jurisdiction over unfair labour practices, as defined in the Wagner Act 29/, the Taft-Hartley Act 30/ and the Landrum-Griffin Act. 31/ This does not mean that the United States courts have no role to play when the subject of the dispute is allegedly an unfair labour practice. An unfair labour practice may also constitute a breach of the terms of a collective agreement under the provisions of sections 301 and 303 of the Taft-Hartley Act 32/ and could give rise to a damage action in federal district court. Federal circuit courts also are involved in the adjudication of unfair labour practice cases in that enforcement of Board orders is not a function of the Board but of the circuit courts, before whom applications for enforcement are heard. 33/ In fact, the enforcement hearing is a form of appeal from the Board. Subject to certiorari being granted, the final disposition of an unfair labour practice case may be before the Supreme Court of the United States. 34/ In 1966 only 1.9% of Board decisions were "appealed" to the Federal Circuit Courts and only 0.3% are ultimately disposed of by the United States Supreme Court. 35/

Finally, matters involving elements of unfair labour practices may, in both Canada and the United States, be covered by the arbitration provisions of a collective agreement. In the United States primary jurisdiction rests with the N.L.R.B., but the Board has adopted a policy under which it will usually defer to the parties' intention to settle the particular dispute through the arbitral process and will subsequently interfere with the arbitrator's treatment of the unfair labour practice aspect of the issue

only if it departs from the policy of the Board as enunciated in its decisions. 36/ This is somewhat similar to the present practice of the Ontario Labour Relations Board to defer in favour of arbitration, but the Ontario Board does not interfere subsequently on any ground.

Canadian labour lawyers, when presented with the broad range of jurisdiction over unfair labour practice matters vested in the N.L.R.B., were generally unsympathetic towards the introduction into Canada of a broader area of board jurisdiction. This leaves the magistrates' court as the forum for redress in most other cases of unfair labour practices. When the area of enjoinable picket line conduct is considered, the forum will usually be the superior court.

A possible workable alternative to board jurisdiction or magistrates' jurisdiction in unfair labour practice cases was the transfer of such jurisdiction to the courts as now constituted or by the federal appointment of special labour court judges. These alternatives enjoyed some support and are dealt with more fully in the general treatment of this subject, infra.

E. THE NATIONAL LABOR RELATIONS BOARD AND INJUNCTIONS

Special mention should be made of the role played by the N.L.R.B. in the area of labour injunctions. Both under the Clayton Act 37/ and the 1932 Norris-Laguardia Act 38/ the jurisdiction of courts dealing with federal labour cases is restricted in the issuance of injuctions. This in no way restricts the state courts from issuing injunctions in the course of labour disputes, granted under the state's inherent police powers in a proper case, where it is demonstrated to the court that the conduct which is sought to be enjoined involves acts of violence, intimidation or coercion.39/

In order to compel compliance with the Wagner Act, 40/ Taft-Hartley Act 41/ and Landrum-Griffin Act 42/ there are vested in the N.L.R.B. certain powers closely related to the granting of injunctive relief. Section 10 43/ of the Wagner Act is concerned with the jurisdiction of the N.L.R.B. to deal with unfair labour practices. Under section 10(j) 44/, one of the Taft-Hartley amendments, the Board has power, when it has issued a complaint in an unfair labour practice case, to petition a federal district court for an injunction until the trial of the case. Additional power is given the Board under section 10(l) 45/ of the Wagner Act similarly to seek injunctive relief in cases involving secondary boycotts, and these cases are to be given priority by the Board. The Board's powers to seek injunctions to restrain the commission of unfair labour practices has only recently been exercised to any appreciable degree. United States management lawyers interviewed tended towards the view that the Board's intervention in seeking a temporary injunction, in such cases, is of limited value. Even in that extreme minority of cases where relief was sought, the Board did not, it was suggested, move swiftly enough to limit the time between the alleged breach of the statute and the obtaining of the temporary injunction.

As to injunctive relief generally, it was found in the United States, especially in cases involving parties experienced in labour management relations, that such relief was not as important as most Canadian management representatives feel it to be. Where violence or threatened violence was involved, resort was more often had to police protection to restrain the unlawful activity. Lawyers representing labour had found that a great deal of concern over the granting of ex-parte injunctions could be overcome by frankly explaining to the judge seised of the matter the nature of their problem in being unable to appear before the court to attempt to explain

away the material filed in support of the application. Lest this explanation appear to be too simplistic, it should be emphasized that the apparent change in attitude toward the granting of ex-parte and short notice injunctions only occurred over a period of years and is attributable, at least in part, to union lawyers ceasing to treat the judges as unofficial agents of management. Even if it is granted that judges tend towards conservative judicial positions, the bar has a duty to assist the court in appreciating some of the special attributes of cases involving labour disputes. Labour lawyers interviewed said that they have found judges willing to discuss the impact of the labour injunction on a strike or picketing situation and to consider the availability of other remedies. Injunctions thus cease to be considered as a primary weapon but rather as a secondary one to be resorted to in situations where courts of equity have traditionally acted. 46/

In the area of secondary activities the N.L.R.B. has acted with considerable inventiveness in contrast with the judicial approach in Canada which has been to treat all secondary activity uniformly. Where there is evidence of secondary picketing the activity complained of will be treated as per se illegal. 47/ Canadian courts, unlike the N.L.R.B., have shown a disinclination to enter upon an examination of the distinctions between various forms of secondary activity.

Section 8(b)(4) of the Wagner Act, as amended by the Taft-Hartley Act and the Landrum-Griffin Act 48/, classifies as unfair labour practices some strikes and various forms of union coercion of employers and employees for secondary boycott or other specified objectives. The N.L.R.B., through its control over the injunction procedure 49/ and the unfair labour practice aspects of such cases 50/ has had an opportunity to create a practicable jurisprudence. In Canada such jurisdiction is generally beyond the powers

of both labour relations boards (except as to the declaration of an illegal strike under section 67 of the Ontario Labour Relations Act) 51/ and magistrates and falls within the traditional scope of a superior court's equity jurisdiction.

A survey of cases under section 8(b)(4) 52/, of the National Labor Relations Act (N.L.R.A.) reveals the Board's attempt to determine the true nature of the activity alleged to be illegal. That which appears to be secondary and illegal may prove on close scrutiny, based partly on expertise in the field of labour management relations, to partake more of primary activity. This has led to the development of the "ally" doctrine, under which it is legal to picket an employer who is performing struck work for a closely related employer. Similarly the problem of the roving site has been treated with some subtlety. In Moore Dry Dock Co. 53/ the N.L.R.B. held that pickets may follow an employer to another's place of business, without committing an illegal secondary boycott if four conditions are met: (1) the picketing must clearly indicate that the union's dispute is not with the person on whose premises it is taking place; (2) it must be limited to places "reasonably close" to the struck employer's activities; (3) the struck employer must be engaged in his normal business on the premises; (4) it must be limited to times when the struck employer is working on the neutral's premises.

Another refinement of the law of secondary activity, developed by the N.L.R.B., relates to incidental secondary effects of primary picketing, which the Board has held not to amount to an unfair labour practice. In Ryan Construction Corp. 54/, where employees of a construction company working on the premises of a steel company refused to cross a picket line

established in connection with a strike at the steel company and thus caused the construction company to cease dealing with the steel company, the Board held such refusal to be an incidental effect of lawful primary actions. Where, however, the employer provides a separate gate on his premises reserved exclusively for employees of the other employer, picketing of that gate may be unlawful: (Local 761 International Union of Electrical Radio and Machine Workers v. N.L.R.B.) 55/

As this study is not intended to be a comprehensive survey of United States federal unfair labour practice law, the above cases are given only by way of example to indicate how the N.L.R.B., by the nature of its expanded jurisdiction, has consciously set out to create and has created a jurisprudence based on rather sophisticated distinctions between various kinds of activity. To some United States labour lawyers such distinctions tended to confuse the parties as to their legal position. To the extent that the decisions creating exceptions to illegal secondary conduct have emerged, such emergence might have resulted from the previous immunity enjoyed by such activity, under the exempting provisions of the Norris-Laguardia Act. 56/ What is evident, however, is that consideration is being given to determining the limits of primary activity. Such limitation has, according to Board and labour representatives, had a salutary effect, as labour unions are not faced with a continuing dilemma when considering strike action, including the use of pickets. On the one hand, they know that merely because there are secondary effects flowing from concerted activity they will not be held to be illegal per se. In addition, the continuous efforts of the Board to define the limits of primary activity provide a touchstone against which planned activity can be measured. Furthermore, under the 1959 amendments to the Wagner Act, primary strikes and

primary picketing, which are not otherwise unlawful, are specifically exempted from the secondary boycott ban. 57/

When Canadian labour lawyers were asked to comment on the possible applications of the United States practice in secondary activity cases, their responses were not unexpected. The prospect of, in effect, vesting in labour boards what amounted to the power to grant injunctions to the possible exclusion of the courts, was a most unwelcome one to almost all lawyers representing management. 58/ Somewhat less predictably, even some labour lawyers balked at the idea.

Given the United States lawyer's somewhat less emotional attitude towards the value of injunctions in labour disputes, and the fact that he had for some fifteen years almost no means of obtaining an injuction in a labour dispute except where there was a ground for invoking the police power of the state, it is not surprising that N.L.R.B. intervention has not provoked the adverse response that a similar arrangement would in Canada. Be that as it may, the United States legislation has provoked a jurisprudence that is more realistic if less certain than its Canadian counterpart. Indeed, Canadian lawyers who favour the present law as opposed to the United States approach, often state their position to be one in favour of certainty. Upon examination, the Canadian cases involving alleged secondary activity, while tending toward certainty of result rarely prove to be models of clarity.

F. THE NATIONAL LABOR RELATIONS BOARD AND THE DUTY TO BARGAIN

As is the case in all eleven Canadian jurisdictions, the United States legislation (N.L.R.A. sections 8(a)(5) and 8(b)(3)) 59/ creates the obligation on the part of the employer to bargain collectively with the union which must be recognized, or on the part of the union, with the employer

whose employees that union represents as exclusive bargaining agent. The nature of the duty to bargain, in Canadian jurisdiction, is dealt with as part of the survey of the efficacy of Canadian legislation. 60/

In the United States the duty to bargain in good faith has given rise to a considerable jurisprudence, both from the N.L.R.B. and the courts. Breach of the duty, whether on the part of the employer or the union amounts to an unfair labour practice and therefore is within the board's jurisdiction. Aside from the differences in wording there is much greater emphasis upon the duty to bargain in the United States because compulsory conciliation before resort to concerted action is, except in a limited area, unknown in the United States. It is a requirement peculiar to the Canadian system (save for Saskatchewan). 61/ The importance of the duty was diminished in the eyes of a substantial majority of Canadian respondents partly because of the existence of compulsory conciliation.

When the United States sections and the jurisprudence dealing with the duty to bargain were discussed with Canadian labour lawyers, they could not see the relevance of creating such an elaborate structure relating to mandatory subjects of bargaining. Nor could almost all management lawyers and a significant minority of union lawyers accept the continuing duty to bargain, during the life of a contract, over matters not contained in the contract and not discussed in pre-contract negotiations. 62/

In the United States, the bargaining requirement has been subjected to voluminous criticism by all shades of opinion. As is the case in Canada, there is the generally held view that a determined, sophisticated party, whether representing the union or an employer, can easily appear to be bargaining in good faith and thus avoid an adverse finding upon the filing of

unfair labour practice charges. Nevertheless, it was also the generally held view that the N.L.R.B.'s continuing emphasis on the duty to bargain has so influenced both the union and the employer that to a considerable extent they do adhere to its elaborate guidelines.

One of the most startling examples of the power of the bargaining provision to induce settlements of seemingly insoluble bargaining issues can be gathered from a study of the subsequent history of the famous Fibreboard case. 63/ That case was concerned with the requirement of bargaining over the decision of the employer to subcontract certain maintenance work performed by members of the bargaining unit. The United States Supreme Court ruled that the contracting-out of work which resulted in the replacement of employees in a bargaining unit with those of an independent contractor, to do the same work under similar employment conditions, in the facts of that case was a mandatory bargaining subject. The problems arising out of automation and subcontracting are not unique to the United States and have caused considerable concern in Canada. Mr. Justice Freedman in his hearings on C.N.R. "Run-Throughs" apparently considered the alternative presented by the Fibreboard decision in arriving at his recommendations. 64/

Canadian management people and many labour people could not see how the bargaining approach, required in the United States, in such circumstances, could achieve any meaningful result. Even where bargaining over such changes takes place, subject to any limitations contained in the collective agreement, management would merely be delayed in implementing its decision. The United States approach, however, while giving the union the right to bargain concerning the decision, preserves management's ultimate decision-making rights. That the union's power is not without some

value was indicated in discussions of the aftermath of the Fibreboard decision with board personnel and lawyers who were involved in that case. When bargaining resumed, each party agreed to concessions. The company did not resume its subcontracting practice, and the union agreed to certain wage rate adjustments, as well as adjustments in the number of persons who would be required to perform the maintenance work.

Some Canadian labour and management people recognized the dilemma in which they found themselves. While apparently favouring the Canadian approach, with its requirement of compulsory conciliation, they generally deprecated the quality of government conciliation officers. At the same time they tended to discount the possibility of government action which would be necessary to create a group of conciliators who would be able to effectively act in a sophisticated situation. Certainly the United States approach attempts to place the onus for achieving a settlement on the parties themselves with the opportunity for calling upon the services of the Federal Mediation and Conciliation Service or state agencies. 65/

G. THE LABOR "BILL OF RIGHTS" IN THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 66/

Because of our interest in the unfair labour practice aspect of internal union affairs, United States federal legislation concerning the internal functioning of unions is relevant. Many of the United States problems in this area have comparable Canadian counterparts.

Prior to the enactment of the Taft-Hartley (1947) 67/ and the Landrum-Griffin (1959) Acts, 68/ there was little United States legislation in this area and, as in Canada today, it was left to the courts to decide cases

based on the law relating principally to voluntary unincorporated associations.

Section 8(b)(1)(A) 69/ of the Taft-Hartley amendments to the Wagner Act 70/ makes it an unfair labour practice for labour organizations to restrain or coerce employees in exercising their rights of organization and representation guaranteed by the Act. This section has its Canadian equivalents, i.e., section 52 of the Ontario Act. 71/ By a proviso attached to the former section, it is not to "...impair the right of a labor organization to prescribe its own rules with respect to the requisition and retention of membership therein". While the problems relating to "acquisition" and "retention" as dealt with in other United States enactments do not have particular relevance to Canada, because of United States prohibitions against closed shops and requirements concerning union shops 72/, nevertheless the so-called Landrum-Griffin Act, "Bill of Rights" 73/ is of considerable interest to Canadians.

The "Bill of Rights" was the product of Congressional investigations which resulted in the disclosure of abuses by some authoritarian union officials and the existence of a number of unions dominated by persons involved in criminal activities. It was anticipated that by ensuring union democracy the authoritarian abuses could be curbed and the criminal element might be driven out of the labour movement. 74/

The statute (Landrum-Griffin Act) provides members of labour unions with a number of safeguards—the first five under the "Bill of Rights" in Title I are: 75/

(1) Equality of Rights concerning the nomination of candidates, voting rights in union elections, attendance at membership meetings and a voice in the conduct of union business transactions, all subject to reasonable rules and regulations of the union. 76/

(2) Freedom of Speech and Assembly with respect to union meetings, business decisions and comments upon candidates for union office, again subject to reasonable rules and regulations. 77/

(3) Balloting on Increases in Dues or Fees. 78/

(4) Suing and Testifying in judicial or agency proceedings, subject to there being no employer assistance and to the exhaustion of reasonable union hearing procedures taking no longer than four months when proceeding against a union or union officer. 79/

(5) Safeguards Against Union Disciplinary Action with the exception of non-payment of dues, unless served with written charges, given time to prepare a defence and afforded a fair hearing. 80/

The above rights guaranteed by the "Bill of Rights" are enforceable by union members in actions in the federal district courts where the alleged violations occurred or where the union's headquarters is located. 81/

Whether the safeguards against arbitrary union actions added very much to the rights of union members, is debatable. However, the publicity surrounding the enactment resulted in a large number of actions by members against unions and union officers under the Act. Americans who were interviewed generally favoured the enactments. There were certain notable exceptions however. One union person (also a law professor) stated that the corrupt unions, the apparent target of the

legislation, had been relatively unaffected by it. Unions acknowledged to be legitimate and democratic were its principal "beneficiaries". The result, it was claimed, has been general undermining of union authority, which has become manifest in many ways, along with the continued existence of a minority of corrupt unions with an entrenched leadership. Significantly, a prominent management person (also a law professor) tended to agree that the legislation had had this unfortunate and unintended effect.

It was in the area of guaranteeing certain basic democratic rights that most Canadian lawyers accepted the principle of recent United States legislation, although a significant number, of all shades of opinion, acknowledged that Canadian courts had, latterally, afforded considerable protection to union members against the oppressive actions of disciplinary tribunals. 82/

A United States interviewee suggested that a declaration of certain basic rights had a beneficial effect on unorganized employees. One of the arguments, often urged on such employees as a reason for not joining a union, is that they will lose a certain amount of their freedom. It was therefore suggested that statutory guaranteed protection of the rights of members would tend to dispel reservations about acquiring union membership.

H. CONCLUSION

There are many other areas of United States labour law concerned with unfair labour practices which might be profitably examined. In fact, many of the areas noted here could be the subject of a separate work with considerable benefit to Canadians working in the area of labour-management relations. Immense profit could be derived by Canadian government officials

through having United States experience made available to them on a continuing basis. No doubt an exchange of experience would also prove useful to Americans, who certainly evidenced a lively interest in Canadian labour law.

Specific reference should be made: to the nature of the evidence which the N.L.R.B. has found sufficient to establish findings of the commission of unfair labour practices; the relevance found in the "total situation" and not only isolated evidentiary facts; as well as the United States statutory provisions requiring an employer to bargain with a union representing a majority of its employees without a certification hearing, all of which have provoked strong conflicting attitudes among United States lawyers and law teachers. 83/

REFERENCES

1/ Act of July 5, 1935, Ch. 372, 49 Stat. 449-457; Public Law 198, 74th Cong.; 29 U.S. Code, ss. 151-166.

2/ Public Law 101, 80th Cong., 1st Sess.; 61 Stat. 136.

3/ Act of Sept. 14, 1959, P.L. 86-257, 86th Cong., 1st Sess.; 29 U.S. Code, Chapter 7, Subchapter II, ss. 151-168.

4/ National Labor Relations Act, s. 8, 49 Stat. 452, U.S. Code, s. 158.

5/ Labor-Management Relations Act (Taft-Hartley Act), Ch. 120, s. 3(d), 61 Stat. 136, 139 (1947). Also see Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the N.L.R.B. (as amended), s. VII, Lab. Rel. Rep. LRX 4201, 4203 (1961).

6/ See Part C of this chapter, infra.

7/ Labor-Management Reporting and Disclosure Act, ss. 101-105 (1959), ss. 411-415 (Supp. IV, 1963)

8/ See N.L.R.A., s. 3, 29 U.S.C.A., s. 153 (1964).

9/ See Chapter II.

10/ See ref. 5, supra.

11/ John L. Clement Co. v. N.L.R.B., 40 L.R.R.M. 1213.

12/ L.M.R.A., s. 3(d); 29 U.S.C.A., s. 153(d); N.L.R.B., R. & R. s. 2.

13/ L.M.R.A., s. 10(b); 29 U.S.C.A., s. 160(b).

14/ See Chapters II and IV.

15/ The Labour Relations Act, R.S.O., 1960, c. 202.

16/ See ref. 12, supra.

17/ See ref. 2, supra, ss. 8(b)(1) - 8(b)(6); 29 U.S.C.A. ss. 158(b)(1) - 158(b)(6).

18/ See 31 N.L.R.B. Ann. Rep. 199 (1966).

19/ The McKinsey Report as printed in Hearings Before the Subcommittee on the National Labor Relations Board of the House Committee on Education and Labor, 87th Cong., 1st Sess., p. 3 (1961) at pp. 1623-24.

20/ Labour Relations Act, S.M., 1966, c. 33, s. 3.

21/ Committee representing labour and management formed to advise the Manitoba government under Professor H.D. Woods of McGill University.

22/ 5 C.F.R., s. 332.404(a) (1964).

23/ Administrative Procedure Act, s. 11, 5 U.S.C., s. 3105 (Supp. II, 1967).

24/ N.L.R.B. R. & R. 102.34 - 102.47.

25/ 5 U.S.C., s. 5332 (Supp. II 1967).

26/ For a recent assessment of trial examiners see Murphy, "The National Labor Relations Board - an Appraisal", 1968 Minnesota L.R. 819, 827-830.

27/ N.L.R.B. R. & R. 102.45(a).

28/ 31 N.L.R.B. Am. Rep. 5 (1966).

29/ See ref. 1, supra.

30/ See ref. 2, supra.

31/ See ref. 3, supra.

32/ See ref. 2, supra; 29 U.S.C.A., s. 185 & 187.

33/ L.M.R.A., s. 10(e), 29 U.S.C.A., s. 160(e).

34/ Ibid.

35/ 31 N.L.R.B. Ann. Rep. 199 (1966).

36/ Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).

37/ 38 Stat. 730 (1919) 15 U.S.C., s. 12 et seq.; F.C.A. 15, s. 101 et seq.

38/ 47 Stat. 70, 29 U.S.C., s. 101 et seq.; F.C.A. 29, s. 101 et seq.

39/ Allen Bradley Local 1111 v. W.E.R.B., 315 U.S. 740, 749-50, 86 L. Ed. 1154, 62 Sup. Ct. 420 (1941).

40/ See Ref. 1, supra.

41/ See ref. 2, supra.

42/ See ref. 3, supra.

43/ Ref. 1, supra, 29 U.S.C.A., s. 160.

44/ Ref. 2, supra, 29 U.S.C.A., s. 160(j).

45/ Ibid., s. 160(1).

46/ The injunction nevertheless remains an important part of state labour jurisprudence. See Report of the Subcommittee on Labor-Management Relations, Committee on Labor and Public Welfare, State Court Injunctions, S. Doc. no. 7, 81st Cong., 2nd Sess. 2 (1951), an important study of state injunctions and the impact of state legislation, paralleling the Norris-Laguardia Act, supra ref. 38, upon state injunctions.

47/ Hersees Ltd. v. Goldstein (1963), 35 D.L.R. (2d) 616 (Ont. C.A.).

48/ See ref. 1, 2, & 3 supra, 29 U.S.C.A., s. 158(b)(4).

49/ See ref. 44 and 45, supra.

50/ See ref. 43, supra.

51/ R.S.O. 1960, c. 202.

52/ See ref. 48, supra.

53/ (1950), 92 N.L.R.B. 547.

54/ (1949), 85 N.L.R.B. 417.

55/ (1961), 81 Sup. Ct. 1285, 42 L.C. sec. 16,966 (U.S. Sup. Ct.).

56/ See ref. 38, supra.

57/ 29 U.S.C.A., s. 158(b)(4)(B), s. 8(b)(4)(B).

58/ See pp. 17, 75 and 79.

59/ 29 U.S.C.A., s. 158(a)(5) & S. 158(b)(3).

60/ See pp. 54 ff.

61/ Trade Union Act, R.S.S., 1965, c. 287, ss. 21, 22, 23. Conciliation is mainly voluntary in Saskatchewan.

62/ For an interesting United States survey of proper subjects for mandatory collective bargaining see: "Proper Subjects for Collective Bargaining - Ad Hoc v. Predictive Definition," 58 Yale L.J. 803 (1949).

For an example of the intervention of the Board and the Courts see N.L.R.B. v. Niles - Bement - Pond Co. 199 F. 2d. 713 (2nd Cir. 1952).

As to the nature of the continuing duty to bargain in the United States, see N.L.R.B. v. Jacobs Manufacturing Co. (1965), 153 N.L.R.B. (No. 119).

63/ Fibreboard Paper Products Corp. v. N.L.R.B. (1964), 379 U.S. 203, 85 S. Ct. 398.

64/ Freedman, Industrial Inquiry Commission on Canadian National Railways "Run-Throughs" (1965).

65/ N.L.R.A., s. 8(d)(3), 29 U.S.C.A., s. 158(d)(3), L.M.R.A., s. 203(b), 29 U.S.C.A. 173.

66/ Ss. 101 - 105 29 U.S.C.A. sec. 411-415.

67/ See ref. 2, supra.

68/ See ref. 14, supra.

69/ 29 U.S.C.A., s. 158(b)(1)(A).

70/ See ref. 1, supra.

71/ 1960 R.S.O., c. 202.

72/ See N.L.R.A., s. 8(a)(3), 8(b)(5) re union security agreements, 29 U.S.C.A. 158(a)(3) & 158(a)(b)(5).

73/ See ref. 66, supra.

74/ See Senate Select Committee on Improper Activities in the Labor or Management Field (McClellan Committee).

75/ See ref. 66, supra.

76/ Ibid., s. 101(a)(1), 29 U.S.C.A., s. 411(a)(1).

77/ Ibid., s. 101(a)(a), 29 U.S.C.A., s. 411 (a)(2).

78/ Ibid., s. 101(a)(3), 29 U.S.C.A., s. 411(a)(3).

79/ Ibid., s. 101(a)(4), 29 U.S.C.A., s. 411(a)(4).

80/ Ibid., s. 101(a)(5), 29 U.S.C.A., s. 411(a)(5).

81/ Ibid., s. 102, 29 U.S.C.A., s. 412. It should be noted that violation of the "Bill of Rights" provisions is not classified as an unfair labour practice and is not within N.L.R.B. jurisdiction, although a violation of the "Bill's" provisions may amount to an unfair labour practice, subject to treatment as such. See s. 103, U.S.C.A., s. 413, as defined in the Wagner Act as amended.

82/ Ibid.

83/ N.L.R.A., s. 9(a), s. 8(a)(5), 29 U.S.C.A., s. 159(a) and s. 158(a)(5); see Snow & Sons, 134 N.L.R.B. 709 (1961), enforced 308 F. 2d. 687 (9th Cir. 1962).

CHAPTER IV

"FOLLOW-UP" STUDY OF APPLICATIONS PURSUANT TO SECTION 65 OF THE LABOUR RELATIONS ACT OF ONTARIO

A. INTRODUCTION

Section 65 of The Labour Relations Act of Ontario provides a means of dealing with complaints that an employee has been refused employment or has been discriminated against as to his employment contrary to the provisions of the Act. Initially, accommodation is attempted but where accommodation fails there is provision for a legally binding decision by the Labour Relations Board.

Section 65 provides:

65 - (1) The Board may authorize a field officer to inquire into a complaint that,

(a) a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment; or

(b) a person has been suspended, expelled or penalized in any way contrary to section 58a.

(2) The field officer shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter complained of.

(3) The field officer shall report the results of his inquiry and endeavours to the Board.

(4) Where a field officer is unable to effect a settlement of the matter complained of or where the Board in its discretion deems it advisable to dispense with an inquiry by a field officer, the Board may inquire into the complaint and,

a) if the Board is satisfied that the person concerned has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment by any employer or other person or a trade union, it shall determine what, if anything, the employer, other person or trade union shall do or refrain from doing with respect thereto, and such determination may include the hiring or reinstatement in employment of the person concerned, with or without compensation or compensation in lieu of hiring or reinstatement for loss of earnings and other employment benefits, and the employer, other person or trade union shall, notwithstanding the provisions of any collective agreement, do or abstain from doing anything required of them or any of them by the determination; or

b) if the Board is satisfied that the person concerned has been suspended, expelled or penalized in any way contrary to section 58a, it shall so declare, and thereupon the suspension, expulsion or penalty is void.

(5) Where the employer or other person or the trade union has failed to comply with any of the terms of the determination, any employer, person or trade union affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later, notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons, if any, therefor, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such.

(6) Where the matter complained of has been settled, whether through the endeavours of the field officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the employer or other person and the trade union who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the employer or other person or the trade union who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint that a person has

> been dealt with contrary to the Act as to his employment, opportunity for employment or conditions of employment, as the case may be.

The Ontario Labour Relations Board has taken the view that the field officer would be hampered in his efforts to effect a settlement in accordance with section 65(2) if facts disclosed to him were reported to the Board and could be made the basis of a Board decision, should accommodation fail. Also, the nature of the field officer's task does not readily allow for disclosure to one party of the case made by the other party to the complaint. On the other hand, natural justice dictates that there be such disclosure if a binding decision is to result. As a solution to this dilemma, the Ontario Labour Relations Board has adopted a policy of referring the field officer's report to a "screening panel" of the Board, and the screening panel then makes the discretionary decision whether or not the Board should deal with the complaint. If the screening panel decides the matter should be considered on its merits, then a different panel of the Board hears evidence in public and reaches a decision on the complaint, without reference to the field officer's report. This policy is discussed by Mr. Finkleman in The Ontario Labour Relations Board and Natural Justice (1965, Queen's University, Industrial Relations Centre), at pp. 38-40.

Section 65 of the Ontario Act appears to be the most vigorous approach to the problem of enforcing the prohibition of discrimination against an employee for union activities. Similar provisions have been enacted in British Columbia, Nova Scotia and Manitoba. (Labour Relations Act, R.S.B.C. 1960, c. 205, s. 7; Trade Union Act, R.S.N.S. 1967, c. 311, s. 40; Labour Relations Act, R.S.M. 1954, c. 1932, s. 6A.) We have therefore done a Follow-Up Study of a sample of proceedings taken under section 65. We have

attempted to ascertain the attitudes of persons who have been party to proceedings under section 65 toward this intervention by the field officer and then by the Labour Relations Board. We have also attempted to ascertain the impact of this type of intervention on the employment relationship generally in the work place involved, and its effect on subsequent certification and bargaining.

Personal interviews were conducted with management and union representatives directly involved in the section 65 proceedings that fell within our sample. The interviews were based on the questionnaire set out in Appendix B.

B. THE SAMPLE

The sample initially selected for the Follow-Up Study was "all proceedings under Section 65 of the Ontario Labour Relations Act in the year preceding the study". Our research assistant decided to work with a period of one year and one month, from the first of February 1966 to the end of February 1967. The relevant figures taken from the Reports of the Ontario Labour Relations Board are as follows:

Monthly Tables for Period
February 1966 to February 1967

Month	Applications received by Board	Applications disposed of by Board
	S. 65	S. 65
February	6	13
March	17	8
April	5	6
May	14	13
June	13	13
July	14	6
August	10	19
September	7	6
October	10	8
November	5	11
December	7	10
January	11	8
February	30	6
TOTAL	149	127

Some of the 149 cases received in the sample period were, of course, not considered by the Board during that period and, by the same token, some of the 127 cases disposed of by the Board had not been received in the sample period. Ultimately our researcher followed up 83 cases which, for the most part, were those that had been both received and disposed of by the Board within the sample period. But not all of such cases could be followed up. In some cases the employer had gone out of business and in others the time allotted was simply insufficient to enable our research assistant to arrange the necessary interviews, particularly where the plant was located outside Toronto. As our research assistant indicates in his report, which is attached as Appendix C, it proved easier to contact the union representatives concerned than to contact management. In 49 cases he was able to interview both management and union representatives involved. In 23 cases only the union representatives were interviewed, and in 11 cases only management was interviewed.

C. FINDINGS

The results of the Follow-Up Study seem, in general, to coincide with our findings in the "Survey of Informed Opinion".

As indicated in Table A, below, there was, overall, a negative assessment by management of the roles of both the field officer and the Board. However, the fact that there was a favourable assessment by management in 35-39% of the cases may be more significant than the overall negative assessment because there is a basic unwillingness on the part of management to admit that any legal intervention into the affairs of the work place is warranted. The prevalence of this attitude is indicated by Tables C, D and E below, which show that a substantial majority of management people interviewed

thought the matter could have been settled without intervention. In light of the prevalence of this attitude it could hardly be expected that management would show an overall positive assessment of the role of field officers and the Board.

In our "Survey of Informed Opinion" we found that the majority of management people thought section 65 procedure to be more satisfactory than any other ways of dealing with management unfair labour practices. The overall negative reaction by management in the Follow-Up Study does not necessarily contradict this finding because, presumably, management reaction would generally be negative to any type of intervention.

The most useful data compiled in the Follow-Up Study, then, was that relating to the attitudes toward intervention by the field officer and, where the matter proceeded to the decision stage, by the Board. These, it must be reiterated, are the opinions of the union representatives and management most directly involved in the unfair labour proceeding under study. This data is presented in Tables A, B and C below.

Table A, below, is a summary of the attitudes toward the field officer's function and the Board function under section 65 expressed by the people interviewed. Table A-1 is of particular interest because it deals with the cases where both sides were interviewed. It should be noted that in nearly half of these cases the union and management representatives agreed in their assessment of the field officer's role. Where they disagreed it was usually because the union's assessment was favourable, as might be expected, but this was not always the case. It is perhaps surprising that the union representative's assessment of the field officer's role was positive in only 50% of the cases. This may be explained in part by the fact that in deciding

which cases to include in our sample our researcher gave priority to following up cases that went ultimately to the Board for decision. This, of course, constitutes a failure for the field officer involved, so there is some bias in the sample toward cases in which the field officer was unsuccessful.

In Table A-2, the cases in which only the union representative was interviewed, the union attitude toward the field officer's role does not appear to be significantly different from that shown in Table A-1. The lack of enthusiasm displayed over the whole range of the sample of union representatives interviewed indicates somewhat less approval on the union side for section 65 proceedings than our "Survey of Informed Opinion" seemed to indicate. Table A-3 indicates a positive assessment by management representatives in cases where only management was interviewed. This is difficult to explain, and perhaps is not significant in light of the small sample. The 39% favourable assessment figure in Table A-4, for the whole management sample, accords more closely with our expectations.

Turning from the field officers to the Labour Relations Board itself, there is a very positive assessment by union representatives of the Board's role. The contrast between this assessment and the 35% favourable management assessment of the Board's role is much more striking than the contrast between union and management assessment of the field officer's role. The contrast in attitudes toward the Board is presented both in the cases where the two sides were interviewed and in the broader sample. It might be that the favourable union assessment reflects the high calibre of Board members, or simply the union's satisfaction with having been given a definite ruling against the employer in a fair proportion of the cases. Management's

TABLE A

In the following tables "+" indicates a generally favourable assessment of the role played by the field officer or Board in the particular proceeding under consideration. "-" indicates a generally unfavourable assessment.

A-1: 49 cases in which both sides were interviewed

	Total	Union+ Man-	Union- Man+	Both+	Both-	Union+%	Man+%
Assessment of field officer's role	49*	17	8	7	16	50%	31%
Assessment of Board's role	23**	11	2	6	4	74%	35%

A-2: 23 cases in which only the union representatives were interviewed

	Total	Union+	Union-	Union+%
Assessment of field officer's role	23	13	10	57%
Assessment of Board's role	9	7	2	78%

A-3: 11 cases in which only management was interviewed

	Total	Management+	Management-	Management+%
Assessment of field officer's role	11	8	3	73%
Assessment of Board's role	1	0	1	0%

A-4: Combined "percentages favourable"; in 71 cases in which union representatives were interviewed and in 59 cases in which management was interviewed

	Union+	Union-	Union total	Union +%	Man+	Man-	Man total	Man +%
Assessment of field officer's role	37	33	71*	52%	23	35	59*	39%
Assessment of Board's role	25	8	33	76%	9	17	26	35%

* Includes one case about which both management and union were equivocal.

** In one of the cases considered management expressed no opinion about the Board although the union representative made a favourable assessment. In two of the cases considered the union representative expressed no opinion about the Board although management made an assessment, in one case favourable and in the other unfavourable. These cases are not included in this total.

disaffection, on the other hand, probably reflects the basic antipathy to government intervention in the work place. Management's negative attitude toward the Board, as well as toward the field officer, does appear to be an important social fact.

Overall satisfaction or dissatisfaction with the function of the field officer or the Labour Relations Board under section 65 is, in itself, an important factor to be borne in mind in deciding whether the combination of accommodation and determination that the section exemplifies is to be given more extended application. The usefulness of this information as an indication of the inherent strength or suitability of the section 65 procedure as a means of implementing labour relations policies is more limited. To what extent, it must be asked, have the parties been satisfied with the procedure after the fact simply because, in the particular case, each got what it wanted in the economic struggle with the other side? Did management express satisfaction where the employee dismissed was not reinstated, or where the union's organizing campaign proved unsuccessful, or where no collective agreement ultimately resulted? Did the union representative express satisfaction just because the man was reinstated, the union was certified or a collective agreement resulted? In an attempt to assess the degree to which "satisfaction" reflects the result of the union's organizing campaign rather than an assessment of the merits of the section 65 procedure, we have examined the cases in which both sides were interviewed from that point of view. The results are summarized in Table B below.

TABLE B

Forty-nine cases in which both sides were interviewed. Reinstatement, certification and ultimate agreement as factors in Management and Union satisfaction.

	Total Cases	Man. Reinstated	Union Certified	Bargaining Commenced	Collective Agreement Reached
*Union+ Man.-	17	11	10	9	4
Union- Man.+	8**	0	3	3	0
Both+	10***	2	6	7	4
Both-	14	4	9	9	2
Totals	49	17	28	28	10****

* Satisfaction and dissatisfaction here indicate an expressed attitude toward the procedure and outcome of the matter at the Labour Relations Board stage, if it went to the Board. If the matter did not reach the Board, attitudes toward the Field Officer determined the values assigned.

** One case in the total of 8 was not classifiable in these respects from information gathered.

*** One case in the total of 10 was not classifiable in respect of whether or not the man was reinstated from information gathered.

**** In two cases management and union gave different answers. The management answer was used, in this respect.

In Table B, the figures for the cases in which the union representative was satisfied and management was dissatisfied may indicate that union satisfaction depended to a significant degree on whether or not the employee allegedly discriminated against was rehired and to about the same extent on whether the union was certified. It was not significant whether a collective agreement resulted. The figures for the cases in which the union was dissatisfied and management was satisfied also show a high correlation of union satisfaction to cases in which the employee was rehired, and the correlation is equally high with the cases in which a collective agreement resulted. Certification is not significant. The cases where both union and management were satisfied show no significant correlation of results and assessment, but the cases where neither side was satisfied once again show high correlation between union satisfaction and both the reinstatement of the man and the making of a collective agreement.

With regard to the union assessment, Table B must be said to indicate that in a significant proportion of cases in which the union representative was satisfied with the section 65 proceedings the employee allegedly discriminated against for union activities had been reinstated by the Board or at the field officer's urging. Union representatives were also more inclined to give a positive assessment where a collective agreement had resulted. Thus, in reading the results set out in Table A it must be borne in mind that union representatives were influenced very considerably in their assessment of the section 65 procedure by whether they had been successful in their larger aims.

When the management assessment figures in Table B are given similar consideration, an equally "result" oriented approach to evaluating the

section 65 procedure is revealed. The only poor correlation between result and assessment by management occurs in the cases where management expressed overall dissatisfaction with the section 65 proceedings and yet had "defeated" the union, in the sense that no collective agreement was ever reached. This, once again, could be ascribed to management's basic antipathy to government intervention.

Other meaningful results of the Follow-Up Study are summarized in the Tables C, D and E below. These are separate tables for each of the stages at which a section 65 proceeding may be concluded. First, proceedings may be settled or withdrawn after investigation by the field officer. Second, he may investigate and report and the matter may be settled, withdrawn or held by the screening panel of the Board to be without substance; and third, the matter may go to the full Board for decision. There are also some matters on the records of the Ontario Labour Relations Board in which a complaint was lodged but was settled or withdrawn before the field officer was appointed. Our research assistant did not include any such cases in his sample.

It will be noted that only 5 of 137 interviews summarized in the tables deal with cases that were concluded at the screening panel stage. In general, if a case is not settled by the field officer the screening panel does refer it to another panel of the Board for a decision on the merits.

Tables C, D and E below summarize opinions and attitudes of the management and union representatives interviewed on a variety of matters, unlike Table A which is concerned only with whether the assessment made by the person interviewed was on the whole favourable or unfavourable. In Tables C, D and E no attempt is made to distinguish cases in which both parties were

TABLE C

Section 65 - Stage 2, field officer appointed, complaint settled or withdrawn.

	Management		Labour	
Number of proceedings considered by people interviewed	38		45	
Ascribed causes of disputes	union fault 28 man. fault - communications 10		union fault 21 man. fault 21 communications 3	
Background	YES	NO	YES	NO
Was the plant atmosphere good? ("NO" includes "fair" and "bad")	35	3	12	34
Was there a formal industrial relations set-up?	7	31	5	40
Outcome				
Was the union ultimately certified?	19	19	28	17
Did the parties engage in collective bargaining?	18	20	26	19
Did the parties eventually make a collective agreement?	12	26	15	30
Do the parties have a better understanding of the legal process in industrial relations as a result of the unfair labour practice proceedings?	20	18	3	42
Assessment				
Could the matter have been settled without intervention of the Board or its officers?	28	10	1	44
Were the field officer's services of real value?	16	22	29	16
Should the field officer have greater powers?	16	22	32	13
Does the field officer have sufficient training?	21	17	29	16
Are you satisfied with the decision?				
Do you feel you got a fair hearing?				
Would you resort to the section 65 procedure again?	21	17	43	2

TABLE D

Section 65 - Stage 3, field officer reports to Screening Panel of Ontario Labour Relations Board, complaint settled, withdrawn or held to be without substance.

	Management		Labour	
Number of proceedings considered by people interviewed	3		2	
Ascribed causes of disputes	union fault 1 man. fault - communications 2		union fault - man. fault 1 communications 1	
Background	YES	NO	YES	NO
Was the plant atmosphere good? ("NO" includes "fair" and "bad")	3	-	2	-
Was there a formal industrial relations set-up?	1	2	2	-
Outcome				
Was the union ultimately certified?	3	-	-	2
Did the parties engage in collective bargaining?	2	1	-	2
Did the parties eventually make a collective agreement?	2	1	-	2
Do the parties have a better understanding of the legal process in industrial relations as a result of the unfair labour practice proceedings?	-	3	-	2
Assessment				
Could the matter have been settled without intervention of the Board or its officers?	2	1	2	-
Were the field officer's services of real value?	-	3	-	2
Should the field officer have greater powers?	3	-	1	1
Does the field officer have sufficient training?	3	-	1	1
Are you satisfied with the decision?				
Do you feel you got a fair hearing?				
Would you resort to the section 65 procedure again?	-	3	2	-

TABLE E

Section 65 - Stage 4, field officer reports, Screening Board holds complaint to have substance, Ontario Labour Relations Board renders decision.

	Management		Labour	
Number of proceedings considered by people interviewed	19		30	
Ascribed causes of disputes	union fault 13 man. fault 2 communications 4		union fault 8 man. fault 16 communications 6	
Background	YES	NO	YES	NO
Was the plant atmosphere good? ("NO" includes "fair" and "bad")	15	4	11	19
Was there a formal industrial relations set-up?	6	13	9	21
Outcome				
Was the union ultimately certified?	11	8	22	8
Did the parties engage in collective bargaining?	12	7	20	10
Did the parties eventually make a collective agreement?	6	13	8	22
Do the parties have a better understanding of the legal process in industrial relations as a result of the unfair labour practice proceedings?	7	12	7	23
Assessment				
Could the matter have been settled without intervention of the Board or its officers?	11	8	6	24
Were the field officer's services of real value?	6	13	14	16
Should the field officer have greater powers?	5	14	16	14
Does the field officer have sufficient training?	7	12	21	9
Are you satisfied with the decision?	9	10	19	11
Do you feel you got a fair hearing?	10	9	23	7
Would you resort to the section 65 procedure again?	8	11	28	2

interviewed from those where only one party was contacted. The most informative aspect, therefore, of the figures in Tables C, D and E are the indications of wide differences in the prevailing attitudes of management and labour toward some of the matters investigated. Differences that are less pronounced are probably not significant.

An examination of Tables C, D and E reaffirms that, compared to management, union representatives are very well disposed toward the efforts of field officers and the Board under section 65 proceedings. These tables may give a truer picture of labour's position than does the simple positive-negative dichotomy that is the basis of Table A. For instance, in both Table C and Table E there is a striking difference between the answers given by management and labour to the question "Was the plant atmosphere good?". Management almost always thought that the atmosphere had been good, the union representatives very frequently thought that it had not been. Similarly, taking Table C and Table E together, in only about half the instances investigated did management feel that the parties had gained a better understanding of the legal process in industrial relations as a result of the proceedings. Labour, on the other hand, felt that this had been the result in almost every case. Perhaps most striking of all, labour representatives were virtually unanimous that in the cases about which they were interviewed the matter could not have been settled without the intervention of the Board or its officers. Management, by contrast, felt very strongly that the matter could have been settled without the intervention of the officer, and even where the matter had gone to the Board, in more than half the cases management representatives thought that the matter could have been settled without any legal intervention. These figures surely indicate that while management is very equivocal towards the role

of both the Board and its officers, the unions see them as a necessary means of preventing unfair labour practices.

The negativism of union representatives which shows up in Table A in many cases may be on the basis that the Boards do not go far enough. A great majority of the union representatives interviewed in cases that ended with the field officer felt that he should have greater powers, and a lesser number, although still a majority, felt that his services had been of real value. Perhaps most significant of all is the fact that labour representatives said, almost unanimously, that they would resort to section 65 procedure again.

In two out of every three cases the labour representative declared himself satisfied with the decision rendered by the Board, where the matter had gone that far, and in three out of every four cases he felt that he had been given a fair hearing. Management was satisfied on both scores in only about half the cases that were followed up.

The parties were asked whether the union involved in the proceedings under investigation had ultimately been certified, whether the parties had engaged in collective bargaining and whether they had eventually made a collective agreement. These were considered significant questions because most of the unfair labour practices for which section 65 provides a remedy occur at the organization stage. In most cases that were settled after the field officer was appointed, the union did get certified and there was collective bargaining, but only in about half of the cases did the parties eventually make a collective agreement. If this is an accurate indication of the state of affairs, it is a rather sobering statistic. It brings home the point frequently made by lawyers and others interviewed in our "Survey

of Informed Opinion" that, where the relationship between the employer and the union is so bad that it engenders complaints under section 65, it is probable that the parties will not be able to form a satisfactory collective bargaining relationship. To some this indicates that our law is deficient in that there is no meaningful enforcement of the requirement of good faith bargaining. To others it is an illustration of the fact of life that, whatever the legal structure, as long as collective bargaining is in the end a free process a strong company will be able to defeat a weak union at the bargaining table.

Table F, below, which deals with the 49 cases covered by our interviewer where both sides were interviewed, supports the conclusion drawn from Tables C, D and E that a relationship marred by allegations of unfair labour practices usually founders at the bargaining table, if not before.

Our research assistant comments in his report, Appendix C, upon the widespread concern among management people with the limitations on "management free speech" in the face of an organizing campaign. Without approving or disapproving the recommendations that our research assistant makes based on discussions in the course of his interviews, we should point out that management people interviewed in our "Survey of Informed Opinion" expressed similar concern. In many cases there is honest concern about the difficulty of making known the plain undistorted facts to employees. Often, of course, what is involved are differing but nonetheless honest perceptions of "the facts" by union and management.

The use of section 65 procedure as an organizing device appears to be a very important abuse of the labour relations legislation. It was commented on by many people in the course of our "Survey of Informed Opinion"

TABLE F

Forty-nine cases* in which both sides were interviewed. Relationship between reinstatement, certification and ultimate agreement.

	Union Certified		Bargaining Commenced		Collective Agreement Reached	
	YES	NO	YES	NO	YES	NO
Man Reinstated	11	6	11	6	5	12
Man Not Reinstated	16	14	14	16	4	26

* Two of these cases were not classifiable in respect of whether or not the man was reinstated, from information gathered.

and our research assistant notes that it was of major concern to the management people directly involved with section 65 proceedings. Labour people, on the other hand, pointed out to our research assistant, as they did to us in the "Survey of Informed Opinion", that section 65 does not provide a sufficient deterrent to management. It does not effectively prevent discrimination in employment for union activity. The employer need only reinstate the employee and compensate him for wages lost. Payment of compensation may be penal in its incidence but generally is not severe enough to deter employers who are inconvenienced by union activity. It may well be regarded by management as a very small price to pay for the chance of defeating a union's attempt to organize its work force.

Our research assistant interviewed a number of union representatives who objected that under section 65 unions are asked to bear the burden, both financial and legal, of acting as "crown prosecutor" in the matter of an offence contrary to a provincial statute.

D. CONCLUSION

The Follow-Up Study of a sample of proceedings under section 65 of the Ontario Labour Relations Act appears to have served several purposes. It has demonstrated the divergent attitudes of labour and management toward the role of the field officer and of the Ontario Labour Relations Board under section 65. It has given some indication of how much the parties differ in their perception of the situation that existed before government intervention occurred and in their assessment of what could have been achieved within the industrial relationship without government intervention. Management generally feels that the plant atmosphere before the incident was good, and that matters could have been straightened out without

intervention. The union representatives almost always disagree with this assessment. The Follow-Up Study has also shown that there is, at best, half a chance of achieving a harmonious industrial relationship in situations where government intervention of the kind provided for in section 65 has proved necessary.

In each respect the Follow-Up Study has supported what we learned in our "Survey of Informed Opinion". This is valuable in connection with the particular findings this substantiates, and it also tends to validate in a general way.

CHAPTER V

THE EFFICACY OF THE LAW OF UNFAIR LABOUR PRACTICES: SOME PERSONAL ASSESSMENTS

A. INTRODUCTION

Our Survey of Informed Opinion did not reveal any great dissatisfaction with the overall working of the unfair labour practice provisions in Canadian labour relations legislation, but there were those who did take strong objection and we personally are dissatisfied with the operation of the legislation in some respects. The instances of our dissatisfaction are considered in this chapter and in connection with some of these we offer suggestions. On other matters we are not prepared to commit ourselves without study that would go well beyond the bounds of an opinion survey.

In what follows we consider first, employer unfair labour practices at the organization stage, that is, employer interference in the selection of the bargaining agent, dismissal for union activity, undercutting the union by changes in wages and working conditions and the run-away shop. The efficacy of the law is assessed in six different types of union-management relationship, classified according to the relative strength and weakness of the parties. This part of our assessment concludes with general observations on the status of field officers and the development of labour board jurisprudence.

We then consider in turn: the duty to bargain; which decision-making body, the courts, the labour relations boards or arbitration, is best suited to handle the various aspects of industrial relations law; the law relating to strikes and picketing; and finally the position of the individual in his relationship with his union.

B. EMPLOYER UNFAIR LABOUR PRACTICES AT THE ORGANIZATION STAGE

There is little doubt that the unfair labour practices legislation in all Canadian jurisdictions is of greatest importance at the earliest stage in the union-management relationship; that is, when the union is attempting to organize the work-force.

The efficacy of unfair labour practice laws must be judged against their purposes and, in our opinion, management unfair practices were prohibited to give employees the open, honest and fair choice of bargaining agents without which there can be no meaningful collective bargaining.

Employer Interference in Selection of Bargaining Agents

In at least some Canadian jurisdictions the employee's freedom of choice has been protected by making it unlawful for the employer to intervene in the selection of the bargaining agent by means of any threat, specifically including, in some provinces, a threat to remove his operation to another locality. Freedom of choice is also protected by making it unlawful for the employer to undercut the union's position by changing wages and working conditions and, most important of all, by prohibiting dismissal for union activities.

In our view the legislation in every jurisdiction should specifically prohibit interference in the "selection" of a trade union and not only in the formation and administration of or representation of employees by a trade union. In the provinces where "interference in selection" is specifically prohibited, it appears that the labour relations board takes a much more rigorous view of what the employer may properly do. Certainly this is the case in Ontario.

There was a good deal of honest management concern about the difficulty of getting "the facts" before employees in the course of an organizing campaign. In our view the facts, as perceived by management, should at some point be presented to the employee, but we share the concern of the labour relations boards that a "presentation of the facts" is very easily transformed into a powerful threat. The labour relations boards should probably be left to work out satisfactory guidelines for management and, to this end, should be encouraged to give fuller reasons in support of their decisions.

It seems to us that a statement by an employer that he will have to close up his operation if a union is certified and demands a wage increase should prima facie amount to an interference in selection unless he can establish subsequently, to the satisfaction of the labour relations board, that there were valid economic grounds for his threat. We are also in favour of a prohibition, such as is found in the British Columbia Act, against any change in wages or working conditions once an application for certification has been made. In jurisdictions where the "freeze" is not imposed until notice to bargain has been given, the union stands exposed during its most vulnerable period.

In the United States the N.L.R.B. has long been sensitive in certification proceedings to such changes in wages and working conditions, and has treated them as unfair labour practices. In some instances the prolonged freeze might impose a real hardship on the employer, but we suggest that hardship can be obviated by allowing changes in wages or working conditions provided there is union consent. Also, where the union refuses to consent or management prefers not to seek its consent (on the ground that this constitutes de facto recognition) management should be able to make the changes with the consent of the labour relations board.

In practice, very few instances of employer threats constituting interference in the selection of a bargaining agent are prosecuted as unfair labour practices. Such interference usually comes to the attention of the labour relations boards in the context of an application for certification. The union advances employer interference as a justification for certification without a vote, where the minimum membership requirement has been satisfied, or as a reason for disregarding the result of an election. Even if interference in the selection of a trade union were not an unfair labour practice the board would still consider evidence of such interference in certification applications, but the fact that it is also an unfair labour practice serves to warn employers and to emphasize to labour relations boards the significance of interference. Interference often takes the form of employer-inspired petitions opposing certification.

Employer interference in the selection of the bargaining agent and union charges during certification proceedings have the effect of starting the union-management relationship off on a bad footing. In our view, serious consideration should be given to the adoption of a "quick vote"

procedure under which there would be an election in every case at the petition of, say, 30% of the employees in an appropriate unit. There are objections to this means of avoiding the occasion for the unfair labour practices that take place on both sides in the context of a prolonged organizing campaign. Unions, it is said, would be less diligent in "selling" themselves to employees and more prone to force votes even though the chances of election were very slim. A suitable system of deposits, to be forfeited upon a poor showing in an election, could perhaps overcome these objections.

Dismissal for Union Activity

If employees are to have an open, honest and fair choice of bargaining agents, the employer must not be allowed to dismiss or otherwise discriminate against employees for organizing or adhering to a union. Adequate provision must be made for detecting such discrimination, but it must not be forgotten that there may be honest reasons for dismissing a union member. Employees and management perceive such things very differently. Management may honestly believe that the employee in question is inadequate, quite apart from his union activities. Furthermore, the sanction provided must have a deterrent effect, but the purpose for which unfair labour practices are prohibited must not be forgotten. They are prohibited to ensure the effective operation of a system of industrial relations. In terms of this purpose it is more important to achieve a healthy continuing relationship between the union and management than it is to detect every infringement by management and punish it so severely that maximum deterrent effect is achieved. We feel that this is best achieved by the "accommodative" approach embodied in section 65 of the Ontario Labour Relations Act. Under section 65 a Board field officer attempts to have the parties agree on the

disposition of cases of alleged dismissal for union activity. Only if accommodation fails does the Labour Relations Board decide the case on the merits. In our view this is the best means yet devised for achieving the purposes of the prohibition of dismissal for union activities.

The overriding problem where there is an allegation of dismissal for union activities is one of proof. In attempting to establish the offence the question ultimately is "why was this man dismissed?", which puts in issue management's reasons. It is, in other words, a subjective matter. Moreover, management is in the best position to judge whether a man's work has been adequate, quite apart from his union activity. It follows that the prohibition of dismissal for union activity can only be effective where the labour relations board or the courts, as the case may be, shifts the ultimate burden of proof to management. Where it is proved that the employee was an active unionist and that he was dismissed, management must bear the burden of justifying his dismissal on grounds other than union activity. This is effectively the position before the Ontario Labour Relations Board. The Quebec Labour Code expressly puts the initial onus on management. In our view the Ontario approach is most satisfactory, but there is some advantage in making the matter of onus statutory, as in Quebec, and thus taking it out of the control of the Board of the day.

Employer Unfair Labour Practices at the Organization Stage: Impact of the Enforcement of the Law in Six Types of Union-Management Relationships.

The efficacy of the prohibitions of employer unfair labour practices may usefully be considered in the context of different types of labour management relationships. The following six classifications are patently ad hoc and incomplete, but they serve to illustrate the real impact of the

law. In these models we have assumed the application of Ontario law, unless otherwise stated.

1. The relatively strong employer, who does not accept the premise of the labour relations legislation, that his employees have the right to select the union of their choice as bargaining agent, faced by a relatively weak union:

Most unfair labour practices occur at the fringes of industry. Frequently the employer is a single entrepreneur or a small company run by management unsophisticated in labour relations. The union that attempts to organize the work force of such an employer may be inherently weak, because it does not have skilled people to assign to the organizing of the particular work place or the operation may be inherently difficult to organize, due for example, to an unstable work force.

If the employer dismisses an employee for union activities and the union lodges a complaint under section 65 of the Ontario Act, a field officer will be sent out. In this type of relationship the field officer may, first of all, play an important educative role. The very fact of his intervention makes the employer aware, often for the first time, that he has done something wrong. Frequently the employer has acted in total ignorance of the law. In most cases, however, education alone does not provide a solution. The field officer must gather facts and form an impression of the case by talking to management, the union and the employees themselves. He is then in a position to face the employer with his wrongdoing and to attempt to get agreement that the man be reinstated. If the field officer concludes that the complaint is unwarranted he will attempt to have the union withdraw it. In either case, if the matter is not settled he reports to the Board's Screening Panel, which turns the matter over to the Board itself if it has any merit.

In this type of situation, if the employer does not agree to reinstate the employee a difficult problem of proof arises. Employees still on the job have good reason to fear that unless they "mind their own business" they too may lose their jobs. The union therefore finds it difficult to gather evidence for presentation at the hearing before the labour relations board. Union officials cannot enter the employer's premises, the employees do not want to be publicly associated with them and the only means of contact may be at the employee's home. Frequently employees will seek to avoid even this contact. When the evidence is collected the union may not be able to find an employee who is willing to take the stand at the board hearing. Faced with these difficulties, the union frequently abandons its complaint. Besides, union officials know that even if the section 65 application is successful and the union is ultimately certified, the chances of getting a collective agreement are poor in such a relationship.

It is, of course, virtually impossible in a situation of this type to obtain the kind of evidence necessary to convict the employer of an unfair labour practice in a prosecution before a magistrate, even if the labour relations board or minister of labour, as the case may be, does grant consent to prosecute.

In our view the incidence of unremedied dismissals in this type of situation could be reduced by making some institutional changes suggested by the United States system. As set out in Chapter III, in the United States the field examiners or attorneys attached to the regional offices of the N.L.R.B. are empowered to investigate alleged dismissals for union activities and to report to their Regional Directors. With due regard to the recommendation of the field examiner or attorney, the Regional Director

then decides whether there is sufficient evidence to issue a complaint for prosecution before a trial examiner. In the event that prosecution is proceeded with, the evidence obtained by the field examiner or attorney in his investigation is admissible at the hearing before the trial examiner. If, under the Canadian system, the field officer's report were similarly admissible at the board hearing there would be many more reinstatement orders in situations where the employees fear for their jobs.

If the field officer's report were made admissible it would, of course, be objected that this would result in a breach of natural justice. In answer we would cite the United States example. Natural justice is observed if the employer is given due notice of the contents of the field officer's report and allowed to cross-examine the field officer and introduce contradicting evidence. Provision would perhaps have to be made for the protection of any employees named in the report.

United States experience indicates that the field officer's educative role is not diminished by the power that he wields in comparison with his Canadian counterpart. Indeed, he may command more respect as an educator. The objection has been made that his effectiveness as a mediator would be sharply reduced but, once again, the United States experience indicates that there would still be a high incidence of settlement. Our information is that field officers in Ontario, operating in this type of fact situation, come very close to threatening employers with action by the Labour Relations Board, even though they have no real power to make any such threat. The field officers are careful not to formally commit themselves to the position of having made a threat, but the fact remains that to give them such power probably would not much affect their function as mediators. If

this new power were to be given it would be even more important than it now is to upgrade the status of field officers by paying them more.

Consideration should also be given to establishing the office of "Prosecutor" attached to labour relations boards. This prosecutor would, after consideration of the field officer's report, decide whether to lodge a complaint and he would present the case against the employer.

Whatever changes are made in enforcement procedures, the fact remains that in a relationship of the type considered here the employer will probably be able effectively to resist union pressure for a collective agreement. Possible changes in the duty to bargain in good faith and its enforcement are considered below. Without some changes, few collective agreements will result and unions may not consider organization in case of the type here postulated to be a worthwhile effort.

2. The relatively strong employer, sophisticated or well advised in labour relations, who does not accept unionization of his employees:

This fact situation differs from the type 1 only in that the employer knows very well what he is doing. The field officer will, therefore, accomplish nothing through education. But the union will encounter the same difficulties in establishing its case either under section 65 of the Ontario Act or in a prosecution. Changes suggested in our consideration of type 1 would be beneficial here as well. Successful prosecution of unfair labour practices, however, will be even less likely than with an unsophisticated employer.

Proving dismissal for union activities will be doubly difficult because a well advised employer will have kept a "book" on any employee that he has

dismissed. In many cases, if the matter comes before the labour relations board, the employer will be able to establish a bad employment record for the employee, and it will be very difficult for the union to establish that the shortcomings noted by the employer are only those of the average employee. On the other hand, this type of employer might be much more impressed by a field officer with the power to make a report that could be admitted in evidence against him. Even though he felt reasonably confident that the proceeding would be unsuccessful, such an employer might well wish to avoid the airing of an adverse report and would, therefore, be more readily pressured into reinstatement by a field officer who had this power. Obviously there is scope for abuse by a field officer with this power, and we stress again the importance of upgrading the position.

This type of employer presents the greatest difficulties in the area of "employer free speech". He will attempt to dissuade his employees from adhering to the union that is attempting to organize them, being careful all the while to stay within the letter of the law. As is noted above, in our opinion it is up to the labour relations boards to issue guidelines for employers which will effectively protect the employee's right to select a bargaining agent of their choice.

The strong and sophisticated employer, like the employer in relationship type 1, who wishes to defeat a relatively weak union will probably be able to do so at the bargaining table, even if the union does get certified. Bargaining is ultimately a test of strength and, in addition, the sophisticated employer will know how to take advantage of delaying tactics that will almost certainly defeat a relatively weak union. We comment below on possible changes in the duty to bargain in good faith and its enforcement.

3. The tough minded employer, who accepts the premise of the labour relations legislation, that his employees have the right to select the union of their choice as bargaining agent, but who wishes to give nothing away, faced by a union organizing campaign:

In our view the relative strength or weakness of the union in this case will make a difference only in the concessions the union will be able to get in the collective agreement. It is possible that such an employer might defeat the union at the bargaining table, with no resulting agreement, but more probably the union will acceed to a poor (in its view) collective agreement before it loses the support of the employees.

An employer of this type, faced with an organizing campaign, is frustrated by what he regards as the unfairness of the law which allows the union to "say whatever it wants to the employees" while denying him the opportunity to adequately present "the facts". We reiterate that, in our view, the labour relations boards must be left free to articulate a policy on "employer free speech" that takes into account this honest concern, which may be founded upon a perception of the facts quite different from that of the employees or the union. The policy must also, of course, be tough enough to deter the employers in fact situations 1 and 2, set out above.

In our view the union is limited in what it may say to employees only by the prohibition against "intimidation or coercion". There is a great deal of disagreement about exactly what is meant by "intimidation and coercion". The common law authorities indicate that there must be a threat of an illegal act for there to be intimidation or coercion. But what, by this definition, is the nature of the reportedly common threat, "unless you sign up there won't be a job for you when we get certified"? Strictly speaking, such a statement is not necessarily untrue because a strict closed shop

provision might be negotiated. The "no job" threat is therefore not necessarily a threat of any illegal act. However, the threat does convey the idea that the employee will not have any chance to join the union after certification and thus retain his job, and this would almost never be the case. At any rate, in our view, the "no job" threat should be an unfair labour practice and, where it is established against the union, should affect the decision of the labour relations board in a certification application.

The tough minded but honest employer will also be faced with the fact that the prohibition of dismissal for union activities calls into question his subjective reasons for dismissing an employee. It is a breach of the Act if the reason for dismissing an employee is not only that he is inadequate but also because he is a union activist. Thus, if the employer is affected by anti-union animus and yet is scrupulously concerned with observing the law, dismissal may prove difficult. More frequently, his lawyer is faced with an ethical problem in advising him how to get rid of the employee. Quite apart from the employer's honesty or his lawyer's ethics, where the labour relations board enforces with diligence the prohibition of dismissal for union activities a bad employee may be sheltered from justifiable dismissal by the fact that he is a union activist. Unfortunate as these consequences may be, we have been unable to think of a more appropriate way of achieving a prohibition of dismissal for union activities.

Management frequently protested to us that applications under section 65 of the Ontario Act are being used as an organizing device. Complaints are filed to harass the employer or to give an appearance of activity on behalf of employees and may be dropped in exchange for recognition or during negotiation of the collective agreement. We found it very difficult to

determine how frequently this form of abuse actually occurs. Beyond suggesting consideration of a system of costs which the labour relations board might, in its discretion, award against the union where a complaint is withdrawn, we have no solution to offer. It would, of course, be most undesirable to discourage the settlement of complaints.

4. The unsophisticated and poorly advised employer, who does not accept the premise of labour relations legislation, that his employees have the right to select the union of their choice as bargaining agent, faced by a relatively strong union:

The employer in this case is the same as the employer in situation 1 above, but the union here is one of those few very large unions which by virtue of the sophistication of their staffs and their greater economic resources seldom find themselves in a relatively disadvantageous position.

In this type of relationship the union will almost inevitably be certified and obtain a collective agreement which it feels is satisfactory in the circumstances. During organization the employer may resort to unfair labour practices but the union will be strong enough and knowledgeable enough to make effective use of the remedies provided by the law. In all probability, because of the skill of the union's representatives and the confidence which its strength will engender in employees, such a union will be able to present sufficient evidence to win reinstatement of any employee dismissed for union activities. Under section 65 of the Ontario Act the field officer plays a valuable educational role if he can convince the employer that reinstatement will result. Thus he will both achieve settlement and ward off further incidents.

Once such a union is certified it has sufficient economic strength to retain the support of the employees in the unit during bargaining, even if faced with delaying tactics by the employer. By the same token, the union is likely to win any strike that ensues. The employer may obtain injunctions against picketing, based on allegations of inducing breach of contract, mass picketing and the like, but unless the labour market is very unfavourable from the union point of view, a strong union in the situation here postulated, will ultimately win the strike.

In such situation, if the strength of the union and management were roughly equal, the legality or illegality of secondary picketing or boycotting would be of considerable importance. Our views on secondary action are presented below.

5. The relatively weak employer fighting for survival against a union whose demands are beyond his reach:

This situation is in many ways similar to 4, except that there is no educative role for the field officer to fulfil nor will he be very persuasive in achieving settlements. The employer in this type of situation perceives himself as locked in a struggle for survival. He may not be far wrong because some union leaders take the position that if a company is so marginally economic that it cannot pay the going rate, it should be forced out of business. The unfair labour practice of particular relevance here is the threatened or actual run-away shop.

In most Canadian jurisdictions neither the threat of nor an actual run-away shop is specified as an unfair labour practice. Nevertheless, an unsubstantiated threat that the plant will have to move if the employees unionize may well be held by the labour relations board to constitute an

interference in the selection of the trade union. On the other hand, in our view there is no reason why an employer should not be able to state truthfully to his employees that if the union in question is certified and makes the same demands upon him that it has made elsewhere he will be forced to close or to move to another locality. It should probably be left to the labour relations board to develop their concepts of what constitutes corporate inability to continue operations.

It is a more difficult problem to know how to deal with the employer who does move his operation to avoid being forced into a disadvantageous collective agreement. Should he carry his certification with him? Should there be any limits on his right to remove his operation? We have no answers to propose, but can only comment that these problems are best viewed as part of the wider problem of economic disparity within the provinces and between provinces in Canada. In the United States the N.L.R.B. has wide powers to fashion an appropriate remedial order in such cases.

6. Contractors and unions in the building trades:

In the course of our Survey of Informed Opinion we were continually impressed by the special nature of industrial relations in the building trades. In this area the unfair labour practices requiring the greatest special attention are the union unfair practices of wildcat strikes, called during the currency of collective agreements, and illegal picketing. The picketing may be illegal because it is in support of a wildcat strike, because it induces breaches of contract or because it is secondary. We comment below on illegal strikes and picketing.

The impact of management unfair labour practices at the organization stage would not appear to be substantially different in the construction industry than it is in industrial contexts.

The Status of Field Officers

As set out above in our consideration of relationship type 1, we are of the opinion that the efficacy of the prohibition against dismissal or discrimination in employment for union activity would be increased if changes were made in the enforcement procedure, along United States lines. The field officer's report should be admitted as evidence in the board hearing. If we were to go even further and implement the office of "Prosecutor" attached to the boards, then the field officer's report would be the basis of the prosecutor's decision to lay a complaint. In Ontario the field officers' record of settlement is an impressive one but United States experience indicates that the changes suggested would enhance rather than diminish the field officer's power to persuade the parties to settle and would also enhance his role as an educator. We do not believe that the quality of settlements achieved would be diminished because even now, in a good many cases, the employer is acting out of fear of a charge before the labour relations board, having been advised by the field officer that the complaint will probably be successful. Even if the field officer is not given new powers, and particularly if he is, we recommend most strongly that the status of the position of field officer be substantially upgraded. There is one principal way to do this; pay higher salaries. A very substantial increase in field officers' salaries will ensure that highly qualified people can be hired for the job. If the suggested changes are made the job will require people who are competent to bear the responsibilities of decision

making and who are, at the same time, capable of furthering accommodation between the parties. This investment would repay itself many times over by reducing the incidence of industrial conflict. Of all our suggestions, this one is most strongly urged.

Developing Board Jurisprudence

The only practical solution to the difficulties of, for example, establishing the limits of "employer free speech", determining the limits of an employer's right to threaten to close or move his plant and defining a meaningful duty to bargain in good faith is to leave the labour relations boards free to develop a labour relations jurisprudence. If a special jurisprudence is to develop, the boards must be required to give full reasons in support of their decisions. For a tripartite tribunal, the decisions of which may be based partly on logic and policy and partly on "horse trading" between the nominees of the interested parties, full reasons may be difficult or even embarrassing to state. But this is merely an added argument for full written reasons. A practicable jurisprudence of unfair labour practice law can only be developed if exposure of the reasons for decisions forces the boards to be consistent.

We have already indicated that, in our view, unfair labour practices and the legal sanctions invoked against them in the final analysis count for little where the parties fail to make a collective agreement. The development of a satisfactory duty to bargain in good faith is, therefore, pre-eminent among the matters upon which a labour relations jurisprudence must be developed.

C. THE DUTY TO BARGAIN

The law relating to management unfair labour practices appears to be reasonably effective in ensuring that the bargaining agent preferred by the majority of employees in the appropriate unit is certified. This, however, is no guarantee that a collective agreement will be concluded.

In every Canadian jurisdiction the labour relations legislation imposes a duty to bargain in good faith or, what amounts to the same thing, a duty to make every reasonable effort to reach a collective agreement. This, however, has been held to require one party to do no more than meet with the other where a new concession has been granted. There is no requirement that each new proposal by one side be met with a new proposal by the other until an impasse is reached. Nor does the law require that certain matters must be bargained about, while other matters need not, but may, be bargained about if both parties are willing. Crudely put, the requirement of proposal and counter proposal and the classification of the subjects of bargaining as mandatory or voluntary are the most vital concepts in the United States N.L.R.B. view of bargaining in good faith.

Very few people that we talked to in the course of our Survey of Informed Opinion were in favour of the highly structured United States approach to bargaining in good faith. We are of two minds on this matter. Professor Gorsky tends to favour the United States approach, being of the view that it puts additional pressure on the parties to sit down together at the bargaining table, and this in itself produces more settlements. Professor Christie tends to the view that, ultimately, the settlement must reflect the relative economic strengths of the parties, and that the highly structured approach to bargaining in good faith simply forces the parties

to start from positions that are further apart, in order to preserve the appearance of bargaining.

A more highly structured approach to bargaining in good faith may well be incompatible with the present function of the conciliation officer in the Canadian system. On the other hand, conciliation services are a part (though usually not a compulsory part) of the United States system of industrial relations and conciliation of some kind or other can be said, therefore, to be compatible with the more highly structured concept of bargaining in good faith. Whichever approach is taken, there will continue to be some role in our system for conciliation officers. It is perhaps hardly necessary to mention that we see little purpose to be served by conciliation boards.

In any case, conciliation officers should not play any part in prosecutions for failing to bargain in good faith. Even to call upon a conciliation officer to give evidence in such a case would destroy his function.

The duty to bargain in good faith, whether or not the United States example is to be followed, must be put within the jurisdiction of the labour relations boards and the details should be left to be worked out by the boards as their jurisprudence develops. At present the only means of enforcing the duty to bargain in good faith is by prosecution before a magistrate, with the consent of the labour relations board or minister of labour, as the case may be.

D. THE ENFORCEMENT OF UNFAIR LABOUR PRACTICES LAWS: INSTITUTIONAL PREFERENCES

In general, we are firmly of the opinion that the labour relations boards of each jurisdiction are the institutions best suited to enforce the

prohibitions against unfair labour practices. Where applicable, we favour an accommodative approach to labour relations disputes because the relationship between unions and management and between employees and their employer is a continuing one. There are "rights and wrongs" in labour law but these are subsidiary in importance to the creation and preservation of a healthy relationship. In almost every context, parties should be encouraged to settle their differences rather than have them adjudicated. Where they are unable to settle, or in those instances where settlement is inappropriate, there must be provision for adjudication by a body which understands the problems and the aspirations of the parties in industrial relations.

We are, in general, in favour of retaining the tripartite nature of labour relations boards for the same reasons that we favour an accommodative approach in labour relations. Tri-partitism may hinder the development of a durable labour relations jurisprudence, it may make proceedings slower and we realize that in important cases the real decision is made by the impartial chairman. Nevertheless, there are distinct psychological advantages to tri-partitism. The parties feel more confident before the board because they feel their interests are cared for. Moreover, considerable practical knowledge is brought to bear in decisions. With strong chairmen and a requirement that reasons be published, the disadvantages of tri-partitism are minimized.

In our opinion the labour relations boards should retain the jurisdiction they now have over matters of certification and they should handle jurisdictional disputes as does the Ontario Board. As mentioned above, the boards should be given exclusive jurisdiction in cases of failure to bargain in good faith. They should also be given exclusive jurisdiction in unfair labour practices matters, except for the provisions of the Criminal Code.

The Criminal Code prohibitions upon firing for union activities are almost never invoked, but it is useful to have a national statement of this basic principle. Moreover, if a union is faced with a case so blatant that it is moved to invoke the Criminal Code, and if the evidence is sufficiently strong to satisfy the criminal onus that will rest upon the union, it is probably desirable that the union have that option. Apart from the Criminal Code, the jurisdiction of the labour relations boards in unfair labour practice cases should be exclusive.

In our view cases of dismissal that constitute an unfair labour practice, and that are also in breach of a collective agreement, should be within the jurisdiction of the labour relations boards because it is desirable that a uniform standard be established for such cases.

We envisage no role for magistrates in unfair labour practices matters and consequently the consent to prosecute procedure should cease to exist. The labour relations boards must have at their disposal a wide array of remedies, including the power to impose fines.

In our view the labour relations boards should have full and exclusive jurisdiction over illegal strikes and picketing, including exclusive power to issue labour injunctions. In our view labour relations boards should have some jurisdiction over claims for damages arising from illegal strikes because it is highly desirable that a uniform standard be established in these matters. Provision for appeal from the decisions of arbitrators would, perhaps, be the best solution. If, as we suggest below, a duty of fair representation is to be created, owed by a union to those for whom it bargains, in our opinion the enforcement of this duty should fall within the jurisdiction of the labour relations boards as well. Decisions on these matters

will require the utmost sensitivity to the operation of the system of labour relations. For all these purposes, unions should be treated as legal entities.

There is, however, one area of labour law that should be left with the courts, and that is the law relating to the individual's right to membership in a trade union. Our courts have already developed a considerable jurisprudence that protects individuals against arbitrary expulsion. What is required here is not so much a subtle understanding of the system of industrial relations as a keen but realistic and restrained concern for individual rights, and this the courts have consistently displayed. Moreover, the labour relations boards are so closely involved with the collective aspects of labour relations that they might tend to lose sight of individual values which must come to the fore in cases concerning unjust expulsion.

We realize, of course, that there are constitutional objections, based on section 96 of the British North America Act, to endowing provincial labour relations boards with many of the powers suggested here. We have not concerned ourselves with this problem, but simply suggest that our recommendations could be effectively implemented by converting the provincial labour relations boards into special labour courts, staffed by judges appointed by the federal government. The judges would have to be selected for their expertise in labour matters and not simply plucked from the ranks of the high court judges now on the bench. The nominees of the parties in interest could be called assessors.

E. STRIKES AND PICKETING

In our opinion exclusive jurisdiction to deal with the law of strikes and picketing should be given to the labour relations boards. Only the

boards should have jurisdiction to decide whether or not a strike is illegal; they should be empowered to grant injunctions against unions involved in illegal strikes and should have some jurisdiction in damage actions. Unions should, for these purposes at the very least, be made legal entities. In our view revocation of certification is an inappropriate remedy against a union for participation in an illegal strike, because the effect is to deny freedom of choice to the employees. In addition, the labour relations boards should be empowered to levy fines, but not to award damages, against individual participants in illegal strikes. The concept of compensation to the employer is suitable when applied to the union, but when applied to an individual workman it appears to us to be pointless.

The law relating to picketing and boycotting should be codified and enforced exclusively by the labour relations boards. The British Columbia Trade-unions Act, R.S.B.C. 1960, c. 384, s. 3, indicates the direction the law must take toward codification. The legality of picketing or boycotting carried on in support of a strike must be tied to the legality of the strike, as determined under the applicable labour relations legislation. The law should declare picketing or boycotting in support of an unlawful strike to be unlawful and, as a starting point, all other picketing and boycotting should be deemed lawful. This would go beyond the British Columbia Act and have the effect of legislating out of existence the tangled law of industrial torts; conspiracy, intimidation and inducing breach of contract. There must, however, be limitations placed on this principle and we suggest the following: the general criminal law would continue to apply to the activities of picketing, although we suggest that section 366 of the Criminal Code, relating to "watching and besetting", be repealed. The tort law of trespass, assault and battery, and defamation should continue to apply to pickets

individually or, where appropriate, to the picket line as a group. Limitations on mass picketing and the blocking of ingress and egress would have to be imposed by legislation, and certain types of secondary pressure should be prohibited.

Perhaps the most difficult of these limitations to administer is that relating to mass picketing and the blocking of ingress and egress, matters that now fall under the general head of "legal nuisance". The general principle should be that pickets are permitted only to the extent necessary to put the union's case effectively, that is, persuasively. Limitations would have to be imposed to avoid undue risk of violence or intimidation of management's supporters. The exact determination of the appropriate number of pickets for work situations of various kinds and in various locations must be left to be worked out by the labour relations boards. Professor Christie is of the opinion that the most satisfactory solution might well be to enable the labour relations boards to issue somewhat flexible injunctions, to be administered on the site of the picketing by a field officer. Professor Gorsky would agree that jurisdiction to issue injunctions should be given to labour relations boards, exclusively. In his view a field officer's report should be admissible in evidence at the board hearing, on the original grant of the injunction or upon any application for alteration. In either case, it is obviously essential that the field officer be a man of very high calibre. Thus, our recommendation that the position of field officer be greatly upgraded gains even greater force.

We would want much more time to study the implications before making specific suggestions about the proper limits of permissible secondary activity. However, we are satisfied that the common law position reached in

Hersees of Woodstock v. Goldstein (1963), 38 D.L.R. (2d) 449 (Ont. C.A.) does not distinguish sufficiently between the various types of secondary pressure. Tests must be evolved for distinguishing the case where an apparent "third party" who is injured by picketing or a boycott is in fact closely allied in interest to the employer against whom the activity is legitimately directed. For example, a subsidiary company should, in most cases, not be treated as a third party. "Product picketing", where a retailer cannot establish injury to his business other than the loss that flows directly from a public's refusal to buy the product of the manufacturer against whom the picketing or boycotting is directed, may be such that no injunction should issue. These matters require further study and consideration.

F. THE EMPLOYEE AND HIS UNION

Intimidation and Coercion

As mentioned above, the prohibition against the intimidation and coercion of employees by a trade union organizing their place of work should be made to include a prohibition upon threats of loss of job. Where it is clearly possible that there will in fact be a closed shop arrangement, the union should be permitted to point that fact out to the employee, but beyond that, the union should not be allowed to pressure him into joining by such a threat. Threats of any act otherwise illegal should also constitute an unfair labour practice, as they now do. Moreover, labour relations boards should be ready to consider evidence of such activities in the context of charges brought by management or employees in certification proceedings which challenge the validity of the union's membership figures. The boards should also be sensitive to evidence of the undue use of alcohol in the solicitation of union membership.

Duty of Fair Representation

Without further study we are unwilling to make specific proposals for the establishment of a duty of fair representation to be owed by a union to those for whom it bargains. Nevertheless, we are of the opinion that the individual must be given some recourse, probably to the labour relations board, where he feels that the union has refused for illegitimate reasons to carry his grievance. It might be preferable that the employee be given a limited right to carry his own grievance to arbitration but, subject to further study, we are inclined to the view that favours the creation of a duty to fair representation.

Expulsion and Other Disciplinary Measures

Individual union members must be granted some recourse where they have been expelled or otherwise severely disciplined without proper cause or without due observance of the rules of natural justice. Our courts now demand that natural justice be observed in such cases, and we would favour a continuance of this jurisdiction. Without further study we are unwilling to make specific proposals for further limiting the grounds upon which a union member may be expelled. We do favour, however, the provision found in most Canadian labour relations legislation that a union member may not be expelled for refusing to participate in an illegal strike. The best solution lies with the unions themselves. If adequate internal means of review, along the lines of the U.A.W.'s Public Review Board, were adopted generally then the rule requiring exhaustion of internal remedies, which we favour, would of itself ensure fair treatment to union members without any significant increase in court intervention.

APPENDICES

APPENDIX A

UNFAIR LABOUR PRACTICES - QUESTIONNAIRE

(Privy Council Office Task Force on Labour Relations)

General (Introductory)

1. What, in your view, is the greatest abuse by unions of the labour relations legislation?

2. What, in your view, is the greatest abuse by management of the labour relations legislation?

3. Is it your general impression that the unfair labour practice provisions of the Ontario Act are effective?

4. What do you consider to have been the policy of the legislature in enacting the Labour Relations Act? What should its policy be?

Stage 1: Organization

Employer Unfair Practices

5. In your opinion, are there still many failures to comply with Sec. 48, which prohibits employer participation in, or interference with, the formation, selection or administration of the trade union?

6.(a) Should employer participation and interference at the Organization Stage be treated as an unfair labour practice? (hereinafter called UFLP) (Or would it be adequately met by Sec. 10 (which denies certification to a dominated union) and the exercise of Board discretion on certification applications?)

(b) Does Sec. 48 effect an undue infringement of the employer's freedom of speech?

(c) Is the specific saving of "free" speech valuable? Should it be adopted by jurisdictions other than Ontario and Nova Scotia?

(d) Is a breach of the Registrar's direction, made under Sec. 43(j) of the Regulations, to refrain and desist from propoganda within 72 hours of a representation vote enforceable by prosecution upon consent? (Or is the only sanction that certification will be granted without a vote under Sec. 7(5)?) Should such a breach be treated as an UFLP?

(e) How might representation of the true wishes of employees be better assured?

7.(a) Is Sec. 50 an effective deterrent against:

i - discriminatory refusal to hire union activists?

ii - discriminatory firing of union activists?

iii - threats against union activists?

iv - the yellow dog contract?

(b) Does the presence of Sec. 50 on the statute books deter very much of such activity by the employers? Would there be much of this activity if the section were not there?

(c) Should the Ontario Act contain the caveat found in every other jurisdiction, except Saskatchewan, that nothing affects the employer's right to suspend, transfer, lay-off, or discharge for proper cause?

(d) Does Sec. 50 effectively stop abuses by a subtle employer who, e.g., covers his tracks by firing non-union members or fires generally to terrorize, etc.?

(e) Can legislation be made more effective in this connection?

8.(a) Which procedure of remedy is most effective where there has been a breach of Sec. 50, consent to prosecute or an application under Sec. 65? Would it be an improvement if the government could inspect and prosecute on its own initiative?

(b) Is prosecution after consent ever a useful remedy? In what sort of situation?

(c) Would prosecution upon consent be improved if it were the Minister who gave consent?

(d) Should there be a right of redress in the courts without consent by the Board?

(e) Are the fines set out in Sec. 69 satisfactory?

9. Should the Labour Relations Board itself be able to impose a fine for breach of Sec. 50?

10.(a) Sec. 65 procedure operates as an accomodative procedure to some extent. Is this desirable where there is an UFLP charge?

(b) Do you find Sec. 65 procedure sufficiently speedy and non-disruptive of industrial relations at the plant? (In other provinces - do you think that such a procedure would be speedy and non-disruptive?)

(c) How good is the Ontario staff at achieving settlement? Is there room for improvement in the calibre of officers or their training?

(d) Do the field officers have an educative role? Do they fill it adequately?

(e) Are you satisfied that Sec. 65 procedure is fair and that natural justice is served sufficiently?

(f) Does the Board have too much discretion and generally too much power under Sec. 65?

11.(a) Are you satisfied generally with procedure before the Board in UFLP cases, on consent to prosecute and Sec. 65 hearings?

(b) Should the 6-day period for reply to a complaint or to an application for consent be cut down? Should the Board exercise its power to abridge the time for reply as it does with strike declarations?

(c) Are you familiar with the Practice Note relating to Sec. 65? (The Practice Note provides for the use of a screening panel which determines whether, on the basis of the field officer's report, there should be a hearing by another panel of the Board.) Are you happy with it?

(d) Would you be in favour of the following:

i - a general speed-up of procedures before the Board in UFLP cases?

ii - a shifting of the onus to the employer where there is an allegation of UFLP against him?

iii - legislative requirement of greater particulars in UFLP cases?

iv - legislation which made it clearer (than 86) that the Board has discretion to circumvent technical objections? (Attempt to elicit type of objection found most offensive.)

v - requirement that the Board keep a record of evidence?

vi - requirement that the Board give reasons for decision in <u>all</u> Sec. 65 hearings and consent to prosecute application cases?

(e) Can you suggest any other changes in the regulations relating to Sec. 65 proceedings (Regs. 28 - 31) or consents to prosecute (Regs. Sec. 23 and 24)?

12. Should the field officer or a "trial examiner" be given power to make a binding order? If so, should his order be subject to appeal to the Board, or subject to a decision de novo by the Board, or perhaps subject to the issuance of an "enforcement order" by the Board? Should an appeal of some kind lie to the courts? (It has been suggested that this would be a useful face-saver for the parties.)

13. Sec. 15 of the Quebec Code puts a 15-day limitation period on complaints of unfair dismissals. Is this a desirable limitation? What limitation would you recommend?

14. Does Sec. 367 of the Criminal Code serve any useful purpose in jurisdictions where provisions like Sec. 50 of the Ontario Act apply?

15. Generally, does the law afford unions an adequate opportunity for organization where they are opposed by management or an incumbent union?

Union Unfair Practices

16.(a) What do you understand to be meant by "intimidation or coercion" in Sec. 52? What form does it usually take?

(b) At what stage of the relationship between the parties is Sec. 52 most relevant?

17.(a) Is the Board or are magistrates suitable enforcing institutions where there has been a breach of Sec. 52?

(b) Is Sec. 65 procedure available where there has been a breach of Sec. 52? If not, should it be?

18.(a) Should Sec. 53 be amended to specifically outlaw organizing on the employer's premises without his permission (as does the legislation of several other jurisdictions)?

(b) Would the right to be represented by the union of his choice be better assured to the employee if access to premises were guaranteed by the law to bona fide trade union representatives?

(c) Should access be guaranteed in special cases, as is done by the Quebec Labour Code in connection with logging and mining industries in remote areas (Quebec Code, Sec. 8 & 9)?

Stage 2: Recognition

Employer Unfair Practices

19. Should sweetheart agreements be considered unfair labour practices (by extension of Sec. 48), or is this situation adequately dealt with by Sec. 45a, which allows for termination within one year where a union is not certified and does not represent the majority of the employees?

20.(a) Does Breach of Sec. 50 often occur after an application has been made, i.e., is it often breached by the employer after he has learned who the strong union people on his work force are?

(b) Does Sec. 59a provide adequate protection for union people most directly involved in a certification application (i.e., witnesses)?

21. Does the Act provide satisfactory protection for employees who opposed a union subsequently certified?

22. Should the prohibition in Sec. 59 against changing wages and working conditions, etc. come into effect as soon as an application for certification is made, as is the case in B.C.?

23. In your experience, are applications for certiorari to quash Board orders of certification frequently made after bargaining has commenced? In your experience, is this procedure used either as a bargaining lever or a means of delay? Is it otherwise abused?

Union Unfair Practices

24.(a) Are you in favour of the general principle that recognition strikes should be outlawed and replaced by certification procedures?

(b) Are there many recognition strikes?

(c) Should the Act make it an UFLP to improperly obtain membership cards and evidence of payment of dues?

25.(a) Should all recognition picketing be outlawed, even when there is no illegal strike?

(b) What sanction should follow a breach of Sec. 57, injunction, damages?

(c) Does or should Sec. 57 apply to management activities which "force" a strike?

Stage 3: Negotiation

Employer Unfair Practices

26.(a) Do you consider that Sec. 12, which requires the parties to bargain in good faith and make every reasonable effort to make a collective agreement, penalizes a lack of sophistication rather than a lack of good faith on the part of employers? That is, does the section result in the parties putting forward a frankly preliminary position so that they may give an appearance of flexibility?

(b) Should "Boulwarism", i.e., a "take it or leave it" approach, be considered an UFLP?

27.(a) Do you think sufficient emphasis is placed in this province on the requirement of good faith bargaining?

(b) Is compulsory conciliation an alternative to a highly developed requirement of good faith bargaining?

(c) Do you find acceptable the classification of matters as mandatory or voluntary in cases on the duty to bargain in the U.S.A.?

(d) Should a failure to bargain in good faith be called an "UFLP" as it is in the Saskatchewan Act?

(e) Is the runaway shop, or a threat thereof, a breach of Sec. 12 or any other provision of the Ontario Act? (See Fleck Manufacturing.)

(f) Should there be specific provisions against threatened runaways? (See Sask. Sec. 9(1)(i) and Nfld. Sec. 4(4).)

(g) Do you regard Sec. 59 as important in ensuring proper collective bargaining? How could the section be framed to better ensure good faith bargaining?

28.(a) Is consent to prosecute and prosecution under the Act a suitable remedy for failure to bargain in good faith? What other remedies are available?

(b) What other remedies should be available for failure to bargain in good faith?

(c) Should a conciliation officer be given power to penalize a party who is not bargaining in good faith?

29.(a) Does Bargaining with an individual employee contravene Sec. 51(1) (which gives a certified or recognized union exclusive bargaining rights)? That is, is it an UFLP to make a "side contract"? Should it be?

(b) Is a contract between an employer and an individual employee binding where there is also a collective agreement? Should it be?

30. Have you ever known of a case in which a union has been proceeded against, or could have been proceeded against, for failing to bargain in good faith?

Stage 4: Administration of the Collective Agreement

Employer Unfair Practices

31.(a) Do breaches of Sec. 48 occur frequently in the context of an established bargaining relationship? What form do they take?

(b) Could an individual union member invoke the process of the Board where he thought there was undue management interference with his union? Should he be able to?

(c) Is Sec. 45a, which provides for termination within one year of the bargaining rights of a voluntarily recognized union that does not have majority support, adequate protection against "sweethearting"?

32. Do breaches of Sec. 50 occur frequently in the context of an established bargaining relationship?

33. Should the Labour Relations Act spell out clearer guidelines for distinguishing between "primary" and "secondary" reasons for dismissal where union activity is said to be only incidental in a dismissal case?

34.(a) Do you agree with the policy of the Ontario Labour Relations Board in deferring to arbitration where the breach of the collective agreement in question would also constitute an UFLP? In what sort of case should this policy be departed from?

(b) Should the problem of dismissal for union activity be dealt with by the ordinary courts?

(c) Is there, or should there be, a right of action in the courts where an UFLP could be said to constitute breach of the individual contract of employment? (See Grottoli v. Lock and the cases following it.)

Union Unfair Practices

35. Do breaches of Sec. 52 (intimidation and coercion) often occur during the currency of a collective agreement?

36. Should the Labour Relations Act be amended so that where there has been technological change, under certain conditions and in certain circumstances, it is not an UFLP to strike during the currency of a collective agreement? Which of the following means of dealing with technological change do you think best? -

i - the present situation, with management's right virtually unlimited and all strikes during the currency of the agreement prohibited?

ii - the same as (i) except that the union may call upon an arbitrator to decide whether management has acted in good faith in the negotiation of the last collective agreement and the subsequent technological change? The finding of bad faith would preclude the change.

iii - an arbitrator would be called upon to decide whether the change was a "major one" and one that the union could not be taken to have contemplated when negotiating the last agreement. Where the change was found to be major and uncontemplated, relevant parts of the agreement would be open for renegotiation with the right to strike.

iv - make it an unfair labour practice to implement any major change during the currency of an agreement?

37. Should the Act provide that an otherwise illegal strike is justified where subsequently held to be in protest of an UFLP?

38. Is arbitration a more desirable institution to deal with illegal strikes than either the Board or the courts (aside from the fact that in Ontario only an arbitrator can award damages against the union)?

39. Does the Labour Relations Act prohibit picketing where there is a collective agreement in force (see Sec. 57)? Should the Act prohibit all such picketing? (e.g., area standards picketing)

General (Concluding)

40.(a) Do you think Sec. 65 procedure is effective? Do you think that a similar combination of the accommodative approach with a reservation of the ultimate power to decide the question should be taken by the legislation in relation to all unfair labour practices?

(b) How well would such an approach work with illegal strikes and lockouts?

(c) How well would such an approach work in cases of employer domination, contrary to Sec. 48?

(d) Should a field officer, or "trial examiner" be able to decide the question himself in such cases, in the event that he could not achieve accommodation? If so, should his decision be subject to appeal to the Labour Relations Board, or to a court?

(e) Is there any advantage in having a tripartite Board consider UFLP questions at all?

41. Speaking generally, which institution is best suited to deal with problems of modern labour relations, the Labour Relations Board and its staff, or the courts? Where arbitration is relevant, is it better than these? Are magistrates as suitable as high court judges?

42.(a) Generally, is there, and should there be, a private right of action for breach of the unfair practices provisions of the Labour Relations Act?

(b) Specifically, is there a private right of action in your opinion for breach of Sec. 12, 48, 50, 51, 52 and 54?

(c) In your opinion, should there be a right of action in the courts for breach of Sec. 12, 48, 50, 51, 52 and 54?

43.(a) Is there any basis for saying that under present Ontario law a union owes an enforceable legal duty of fair representation to all persons in the bargaining unit? Should such a duty be owed at either the negotiation stage or during the administration of the collective agreement?

(b) Do you think that the development of a duty of fair representation during the administration of the agreement would swamp the arbitration process? Would it swamp the courts? Would it diminish the role of the unions?

(c) Would you prefer to see the question of fair representation by a union dealt with by the Board or by the courts? Why? In either case, what should the sanction be?

44. Should the Ontario Labour Relations Act be amended to allow an individual employee to carry his grievance to management? Should the individual be allowed to process his grievance through arbitration?

45.(a) Do you think greater protection should be afforded to the interests of individual union members by amended labour relations legislation which concerns itself with internal union matters through the creation of new unfair labour practices?

(b) Sec. 35(2) of the Ontario Act provides that no employer shall discharge an employee who is denied union membership because he is a member of another union. Are you in favour of this provision? Should the law go further and prohibit the closed shop?

(c) Sec. 58a provides that no person shall be expelled from his union for refusing to participate in an illegal strike. Do you consider this merely a codification of the common law? In any case, is it a useful section?

(d) Should the expulsion on any other basis be prohibited?

(e) For example, could this mechanism (UFLP) be invoked to ensure that in expulsion cases the internal appeal mechanism would be exhausted within a limited time? (See the Landrum-Griffin Act, Sec. 101(a)(4). which gives four months.)

(f) Should the Labour Relations Act have a "conscientious objecter" provision as in Saskatchewan, which allows such a person to pay the equivalent of union dues to a charity instead?

(g) Are you in favour of a provision which prohibits the use of union dues to support a political party?

46.(a) Assuming that the law will not be changed to allow recognition and grievance strikes, do you find the present sanctions (declaration of illegal strike, consent to prosecute, injunction and damage actions by courts and in arbitration) acceptable in (i) substance?
(ii) procedure?

(b) Which of these sanctions do you think best achieves the purposes of the Labour Relations Act?

(c) Do you consider the declaration of unlawful strike, pursuant to Sec. 67, to be a useful remedy? If so, why is it effective?

(d) In an illegal strike, does the granting of consent to prosecute of itself frequently solve the problem? If so, why?

(e) Is an application for consent frequently combined with an application for a declaration that the strike is illegal? What is the purpose of combining these two remedies? What effect does it have?

(f) Are the remedies in Sec. 69 adequate? Would they be if there were no other remedies?

(g) Injunction - Do you consider an injunction ordering strikers back to work to be available in Ontario where there has been an illegal recognition strike? Should such a remedy be available?

(h) Damages - Do you consider damages to be available in Ontario where there has been an illegal recognition strike? Should this remedy be available?

(i) Refusal of Certification - Should a union which foments an illegal recognition strike be subsequently turned down on any application for certification with that employer? Would any modified form of this sanction be desirable?

(j) Damages Against Individual Employees - Should damages be available against individuals who participate in an illegal strike?

47. Does Sec. 55 of the Ontario Act, which provides that no union or union officer, etc. shall also procure, support or encourage an unlawful strike, serve as a useful adjunct to the prohibition of recognition and grievance strikes? Should the section be amended to require positive disassociation by union officials as set out in the Polymer arbitration decision?

48.(a) If the power to declare a strike illegal were to be vested in one institution only, which should have it:

i - the courts - which courts?

ii - the Board?

iii - the Board chairman or a vice-chairman (i.e., is tripartitism an advantage at all in this area?)

iv - both court and Board, as at present?

(b) If both the Board and the courts should be able to deal with the question, should a Board declaration on the matter be conclusive?

49. Should a field officer or "trial examiner" be given the power to make a declaration of illegal strike, subject to appeal to the Board or a court?

50.(a) Do you consider the present ground upon which injuctions are issued against picketing to be satisfactory?

(b) Do you think it should be made clear by legislation that primary situs picketing in support of a legal strike is not to be enjoined? What exceptions would you make to this rule: trespass, assault and battery, nuisance (and if so, how would you define it), inducing breach of contract, conspiracy, intimidation?

(c) Should all primary situs picketing in support of an unlawful strike be enjoinable?

(d) Should all secondary picketing and boycotting be outlawed? Should secondary picketing and boycotting be allowed in special cases, e.g., the "ally" doctrine, roving situs picketing? Should Canadian legislation adopt the sophisticated rules of the Moore Drydock case with regard to "primary situs"? (i.e.;

i - the picketing must be strictly limited to times when the situs of dispute is located on the secondary employer's premises.

ii - at the time of picketing, the primary employer must be engaged in its normal business at the situs.

iii - the picket must be limited to places reasonably close to the situs.

iv - the picketing must clearly disclose that the dispute is with the primary employer.)

51. Do you think that the Labour Relations Board, rather than the courts, should issue labour injunctions? If so, would it be better for the Board to make the initial order or should it be made by a field officer, subject to appeal to the Board?

52. Are you satisfied with the existing procedural provisions in which labour injunctions are obtained? If not, briefly, what changes would you suggest?

53.(a) In your experience, at what stage of the relationship is an employer most likely to resort to lockout? Are there many layoffs, dismissals and plant closings, etc. which are in fact bargaining levers but which cannot be proven to be illegal lockouts?

(b) Which sanction is most usefully invoked against an illegal lockout: declaration of illegal lockout, consent to prosecute, or civil right of action?

54. For the purposes of the UFLP provisions, should unions be treated as entities at law? (For purposes of prosecutions under the Act this is achieved by Sec. 55 of the Ontario Act, and the effect of a change in the Rights of Labour Act would be to lay the unions open to damages in court based on breach of the statute directly, or indirectly through conspiracy or intimidation and for inducing breach of contract.)

APPENDIX B

FOLLOW-UP STUDY QUESTIONNAIRE

PART I - Assessment of the situation prevailing in the plant immediately prior to the dispute in question.

General

1. How would you describe the atmosphere on the job prior to the dispute? Had there been a harmonious relationship between management and labour?

(If "Yes" - then ask Questions No. 2, 3, 4 & 5)
(If "No" - then ask Question No. 6)

If answer to Question No. 1 is "Yes":

2. What was the dispute about?

3. What caused the dispute?

4. Are you prepared to indicate who or what was to blame for the dispute?

5. If the relationship had been harmonious for a period of time, why do you feel it was necessary to seek outside help in resolving the differences between the parties?

If answer to Question No. 1 is "No":

6. Was there a relationship which was generally good, but marked by some minor disagreements between the parties?

(If "Yes" - then ask Questions No. 7, 8, 9, 10, 11, 12 & 13)

7. What kind of disputes or disagreements were they?

8. Did they follow a consistent pattern?

9. How were they resolved?

10. What caused this dispute?

11. What was it about?

12. Are you prepared to indicate who or what was to blame for the dispute?

13. Why did your previous method of settling "in plant" disputes break down to the extent that you found it necessary to seek outside assistance?

If answer to Questions No. 1 and No. 6 is "No":

14. Was there a bad relationship marked by constant disagreement and ill feeling?

(If "Yes", then ask Questions No. 15, 16, 17, 18, 19, 20 & 21)

15. What formal method of dealing with "in plant" industrial relations problems did you have prior to the dispute?

16. What was the cause of the disharmony?

17. Did many of the past disputes arise from the same sort of cause?

18. What means have you used to foster a better atmosphere in the plant?

19. What sort of attempts did you make to resolve the difficulty in this case before seeking outside intervention?

20. What was the reaction to these attempts?

21. Do you think the dispute could have been settled without resorting to an outside agency for assistance?

PART II - Job Biography - a determination of the nature of work performed by an employee, his past performance, and future prospects following the settlement of the dispute.

22. What kind of job was the employee doing prior to the dispute?

23. What was he paid?

24. What has happened to him since the settlement of the dispute - has he remained at the plant?

If answer to Question No. 24 is "Yes":

25. (a) Do you think the fact of the past dispute will affect his opportunities for advancement in the plant?

(b) What is he doing now?

(c) What is he being paid?

(d) Is his present job regarded as being a better or worse job in the plant?

If answer to Question No. 24 is "No":

26. (a) Why is he no longer at the plant?

(b) Did the fact of dismissal or lay-off come about because of the situation generated by the dispute?

If answer to Question No. 24 is "No", and if the employee quit:

(c) Did the self-termination come as a result of the situation generated by the dispute?

(d) Do you think he could be successfully re-employed by the firm?

27. Had this employee been the subject of disagreements in the past?

PART III - An assessment of the situation prevailing in the plant after the settlement of the dispute.

28. Have you found that you can "live" with the settlement in a way that would indicate there has been a final settlement, or did it become a continuing source of grievance?

29. Has the settlement resulted in a better understanding by the parties of the rights, point of view, and problems which might confront the opposite party in a given industrial relations situation?

PART IV - An assessment of the parties' attitudes towards the intervenor.

30. Would you resort to outside intervention again?

31. How valuable to you were the services performed by the field officer?

32. Do you think the field officer is given enough power to deal properly with the kind of dispute in which you were involved?

33. Do you think he was sufficiently trained in the job?

34. Who was the field officer?

If the Board sat on the matter:

35. Are you satisfied with the Board's decision whether or not you won?

36. Do you agree with the "facts" as determined by the Board?

37. Do you think the Board was fair in its procedure?

38. Do you think the Board's decision was correct in law?

39. What effect has the case had on the treatment of industrial relations in the plant?

40. Did the union become certified?

41. Did the parties engage in collective bargaining?

42. Was a settlement reached and a contract signed?

APPENDIX C

FOLLOW-UP STUDY ON PROCEEDINGS UNDER SECTION 65 OF THE LABOUR RELATIONS ACT OF ONTARIO

by

Michael Gordon, B.A., M.A., LL.B.

A total of 130 interviews were conducted in respect of 82 cases which arose during the sample year. These interviews concerned proceedings taken under section 65 of The Ontario Labour Relations Act. There were also 12 interviews which concerned the consent to prosecute procedure under the Ontario Act, but the sample was considered too small to be worth reporting on.

For the purpose of identification, the section 65 cases have been classified by stages as follows:

Stage One - Complaint made - no field officer appointed

Stage Two - Complaint made - field officer appointed

Stage Three - Complaint made - field officer reports to screening panel

Stage Four - Complaint made - Board decides on case.

The overwhelming majority of interviews were conducted with persons whose cases had proceeded as far as Stage Two and who either reached a settlement or withdrew their application before any further action was taken by the Ontario Labour Relations Board. Only one interview dealt with a proceeding that terminated at Stage One, and it has been dropped from the sample.

The next largest group of interviews involved cases that proceeded as far as the Board level. Almost all of the cases that came to the attention of the Board at Stage Four were contacted by the writer on behalf of the Task Force during the course of the summer of 1967.

It will be noted that there appears to be a heavier concentration of interviews among union people than among representatives of management. The reason for this apparent discrepancy is that many of the union representatives contacted had been responsible for, or connected with, more than one section 65 application. While this in no way shortens the amount of time that had to be expended on each individual case or questionnaire, it did make it more convenient for the writer and cut down on the travel time involved. The management interviewees, on the other hand, by and large, were able to deal with one case only and, more important, being unfamiliar with labour relations law, required some briefing to refresh their memories before successful interviewing could begin. Further, most management interviews seem to take an inordinate length of time due, probably, to the almost inbred resistance which middle-size or small management has to investigations, particularly in the area of labour relations.

By and large, it is fair to say that the labour people interviewed were far better informed with respect to procedures and proceedings under the Labour Relations Act than were their management counterparts. While there were a few labour interviewees who seemed relatively ignorant in respect of their rights and privileges under the Act, it must be said that almost all management interviewees displayed an appalling ignorance of the Act and the rights, privileges and duties of management in respect of labour relations law.

Another interesting, and I think, significant, factor which emerged was the distinction to be drawn between those interviewees with pre-depression experience in either labour or management, and those whose experience extended only so far as the post-war period. Among the latter group there was a higher degree of educational attainment, greater sophistication, and more good will than among the former. There seemed to be an apparent feeling that the issues and battles had all been decided a long time ago and the only real issue now existing concerned obtaining the best bargain for either side. On the other hand, the pre-depression group still appeared to be going over and refighting old wars, the scars from which still caused bitter memories.

The general consensus to be derived from the better informed people on both sides of the labour-management fence seemed to be that the law as it is on the statute books is basically sound--only the administration of it left something to be desired.

The attitudes which manifested themselves are summarized in the following tables. (See Tables E,F and G in Chapter IV of study (Christie and Gorsky)).

In addition to the tabulated results there were, of course, certain general impressions with which I was left after conducting such a substantial number of interviews. What follows is a summary of the more concrete of these impressions.

Management

Much concern was expressed among management people about the so-called "management free speech" clause of the Act and the limitations on management's

ability to participate in the determination of whether or not a union would become established in their plant. Some management people felt, however, that the arguments generally put forward in this respect are far from sound. They felt that if management had pursued responsible and enlightened policies in the first instance, the requirement of union representation for the employees would not have arisen in the first place.

A major deficiency that concerned management was the use of the unfair labour practice sections of the Labour Relations Act as an organizing device by labour. In their view, the law is being used by the unions as a sword rather than a shield, and in their opinion, this is a very unhealthy situation. The claim is that the unfair labour practice sections can be a considerable nuisance and that they often cause management a great deal of expense and trouble for no really legitimate purpose. It is their claim that often employees are dismissed for incompetency and that they are later faced with an unfair labour practice charge when they did not, at the time, realize a union was being organized in their shop.

Management people also suggested that their hands are tied completely in respect to the organization and disciplining of employees within the plant during the period of the organization of the union.

These attitudes are consistent with the change in approach taken by many managements where a union has gained recognition. One manager freely admitted that there were a number of employees in his plant that were not really very competent but whom he would keep on the job provided that it was not costing him too much money. He suggested that the presence of a union, on the other hand, made all the difference in the world in respect of his attitude towards employees. In his view, those who were incompetent,

or who were not very valuable to the company, would have to be dismissed if a union were to come on the scene demanding higher wages and greater fringe benefits. He argued that he should be allowed to discharge all employees whom he deemed inefficient the moment an organizing attempt comes to light. The unfair practices sections, he claims, preclude this.

Participation by student employees in representation votes was also of considerable concern to management. It was suggested by one plant manager that his employees did not in fact want to have a trade union in their shop. However, during one summer he hired on a large number of summer students and temporary help during an unusual peak period, and it was this group that organized and brought the union into his plant. At the end of the summer when he returned to a more normal-sized work force, he found that he had a union in his plant and a group of "regular" employees, a greater percentage of whom had openly spoken against the union or at least had voted against a union coming into his shop. In the result, his employees were unhappy as they were not well represented by the union. The dispute in this case was bitter enough that the animosity occasioned by it has had a lingering and detrimental effect on the on-the-job atmosphere at this particular plant.

Labour

Some elements of labour freely admitted that they used the unfair labour practice sections as an organizing device. But, they suggested, informed management can and does use unfair labour practices to break a union organizing attempt. They are able to do this, the unions claim, because the procedures under the Act in respect of section 65 applications are so long and drawn out that by the time the union gets its remedy the damage has been done and the organizing attempt destroyed.

A major complaint of union representatives was that unfair labour practices are used by management at the trifling expense of a small fine or payment of back wages. Management can thus rid itself of, or avoid, the unionization of the plant. The Act, labour representatives claimed, does not protect the individual, nor does it protect the trade union. Some feel that they are being asked to bear the burden and financial weight of acting as "Crown Prosecutors" in bringing suit against companies for breaches of a provincial statute. Moreover the onus on the union to prove its case is, at the present time, too high in the opinion of many and it is also said that often the attitude of the Board towards individual witnesses and the protection of them from lawyers' badgering leaves a good deal to be desired.

Labour representatives also complained that the consent to prosecute procedures under the Act are relatively valueless and that the obtaining of such a consent is a hollow victory indeed. Labour, like small management, also objected very strongly to the cost of the legal process. Some of the smaller "craft" locals deliberately avoid seeking remedies and taking advantage of the procedures under the Act for this reason.

It must be emphasized that almost every labour interviewee expressed concern about the long drawn out procedures under section 65 applications and emphasized the desirability of a speedier method of dealing with these cases. The net result of the present administration of the Act is, it is claimed, that the employees have no real protection from management during the organizing period.

Many labour leaders expressed the view that there should be automatic certification of unions where a management is found guilty of an unfair labour practice.

Other areas of complaint included the suggestion that decertification procedures under the Act are too easy, that there were not enough field officers at the present time to deal with the existing load and that some of the existing officers did not seem to be well enough trained to do their job. It was suggested that the Board makes little or no effort to advise workers of their rights, and that the present voting procedures need some overhauling.

Conclusions

While a good deal of dissatisfaction has been expressed by both labour and management with respect to remedies and procedures under the Ontario Labour Relations Act, the better informed members of both groups appear to take the view that there is nothing much wrong with the Act as it exists. The complaint is with the administration of the Act. The feeling is that administrative practices and procedures could be improved considerably and that if such administrative reforms were to be introduced, the existing legislation would be perfectly all right.

As one reads through the transcripts of interviews from both management and labour interviewees, it becomes increasingly clear that the complaints of those people who cannot be considered "well informed" are really much the same complaints as those put forward by their better informed counterparts. Their basic objections are essentially, not about the Act, but about the administration of it. To almost all people, the most pressing need is for administrative reform in the application of the unfair labour practice sections.

It should also be mentioned that almost all management people interviewed came away from their contact with the legal process feeling that they had indeed learned something. It is admitted by many of them somewhat wryly that their exposure to the Labour Relations Board had been "an education". These people did in fact learn a great deal more about their own companies, their work forces, and the demands of society as a result of their exposure to a charge of unfair labour practices. For many people in management the charge that they had been "unfair" in their dealings with certain of their employees was an experience that had an almost shattering effect on their individual and corporate self-esteem.

Most of the labour interviewees indicated that they had not learned anything from their exposure to the legal process, probably because most of the labour people interviewed had been involved in one way or another with procedures under the Labour Relations Act before.

Suggestions for Reform

My personal suggestion, which I hope will be passed on to the Task Force, is that a "quick vote" procedure be adopted in certification proceedings. Many individuals, both management and labour, whom I interviewed toward the end of the summer, reacted favourably to the following proposal:

1. The union should be required to notify management and the Ontario Labour Relations Board of its intention to organize a particular plant.
2. At that point there should be (a) an immediate job freeze; (b) management should be required to provide the union with a list of all employees in the unit, and (c) the Board should appoint a field officer to act as a referee of all or any disputes arising out of the organizing campaign.

3. The union should be given an opportunity to "address the employees" on company time and on company premises.

4. Management should be given an equal opportunity to "address the employees". Both sides should be limited in what they say only in that there must be no attempt to coerce employees.

5. The company should be required to make time and space available before the taking of a vote, for the arbitrator or field officer to explain to the employees their rights and privileges and the voting procedures to all the employees in their own language.

6. There should be no necessity of the union obtaining signed cards and the payment of a fee.

7. There should be an automatic supervised vote in any event, with the issue determined on the basis of a simple majority of the ballots cast.

It was felt that this suggested procedure would eliminate coercion of employees by both management (see paragraph 7) and by the union (see paragraph 6).

The field officer being on the job site would have the power to adjudicate all disputes on the spot and settle most issues as they arise. Being "on the scene", he would have a better grasp of the actual "in plant" situation than a Board sometime after the event. The "job freeze" would eliminate much of the present activity under section 65 of the Act.

MANAGEMENT - Sec. 65

STAGE: 2

1-Atmosphere	GOOD	FAIR	BAD
	35	1	2
2-Cause	Union	Communications	Management
	28	10	-

		YES	NO
15.	Was there a formal industrial relations set-up?	7	31
21.	Could the matter have been settled without the intervention of the Board?	28	10
29.	Do the parties have a better understanding of the legal process as a result of their involvement in the dispute?	20	18
30.	Would the parties resort to the Board again?	21	17
31.	Were the field officer's services of any real value?	16	22
32.	Should the field officer have greater powers?	16	22
33.	Does the field officer have sufficient training?	21	17
35.	Satisfied with Board decision?	-	-
36.	Did the parties feel they got a fair hearing?	-	-
40.	Did the union become certified?	19	19
41.	Did the parties engage in collective bargaining?	18	20
42.	Did they reach a settlement?	12	26

MANAGEMENT - Sec. 65

STAGE: 3 Total - 3

	GOOD	FAIR	BAD
1-Atmosphere	3	-	-
2-Cause	Union	Communications	Management
	1	2	-

		YES	NO
15.	Was there a formal industrial relations set-up?	1	2
21.	Could the matter have been settled without the intervention of the Board?	2	1
29.	Do the parties have a better understanding of the legal process as a result of their involvement in the dispute?	-	3
30.	Would the parties resort to the Board again?	-	3
31.	Were the field officer's services of any real value?	-	3
32.	Should the field officer have greater powers?	3	-
33.	Does the field officer have sufficient training?	3	-
35.	Satisfied with Board decision?	-	-
36.	Did the parties feel they got a fair hearing?	-	-
40.	Did the union become certified?	3	-
41.	Did the parties engage in collective bargaining?	2	1
42.	Did they reach a settlement?	2	1

MANAGEMENT - Sec. 65

STAGE: 4 Total - 19

	GOOD	FAIR	BAD
1-Atmosphere	15	1	3
2-Cause	Union	Communications	Management
	13	4	2

		YES	NO
15.	Was there a formal industrial relations set-up?	6	13
21.	Could the matter have been settled without the intervention of the Board?	11	8
29.	Do the parties have a better understanding of the legal process as a result of their involvement in the dispute?	7	12
30.	Would the parties resort to the Board again?	8	11
31.	Were the field officer's services of any real value?	6	13
32.	Should the field officer have greater powers?	5	14
33.	Does the field officer have sufficient training?	7	12
35.	Satisfied with Board decision?	9	10
36.	Did the parties feel they got a fair hearing?	10	9
40.	Did the union become certified?	11	8
41.	Did the parties engage in collective bargaining?	12	7
42.	Did they reach a settlement?	6	13

UNION - Sec. 65

STAGE: 2 Total - 45

	GOOD	FAIR	BAD
1-Atmosphere	12	11	23
2-Cause	Union	Communications	Management
	21	3	21

		YES	NO
15.	Was there a formal industrial relations set-up?	5	40
21.	Could the matter have been settled without the intervention of the Board?	1	44
29.	Do the parties have a better understanding of the legal process as a result of their involvement in the dispute?	3	42
30.	Would the parties resort to the Board again?	43	2
31.	Were the field officer's services of any real value?	29	16
32.	Should the field officer have greater powers?	32	13
33.	Does the field officer have sufficient training?	29	16
35.	Satisfied with Board decision?	-	-
36.	Did the parties feel they got a fair hearing?	-	-
40.	Did the union become certified?	28	17
41.	Did the parties engage in collective bargaining?	26	19
42.	Did they reach a settlement?	15	30

UNION - Sec. 65

STAGE: 3 — Total - 2

1-Atmosphere

GOOD	FAIR	BAD
2	-	-

2-Cause

Union	Communications	Management
-	1	1

		YES	NO
15.	Was there a formal industrial relations set-up?	2	-
21.	Could the matter have been settled without the intervention of the Board?	2	-
29.	Do the parties have a better understanding of the legal process as a result of their involvement in the dispute?	-	2
30.	Would the parties resort to the Board again?	2	-
31.	Were the field officer's services of any real value?	-	2
32.	Should the field officer have greater powers?	1	1
33.	Does the field officer have sufficient training?	1	1
35.	Satisfied with Board decision?	-	-
36.	Did the parties feel they got a fair hearing?	-	-
40.	Did the union become certified?	-	2
41.	Did the parties engage in collective bargaining?	-	2
42.	Did they reach a settlement?	-	2

UNION - Sec. 65

STAGE: 4

Total - 30

1-Atmosphere

GOOD	FAIR	BAD
11	1	18

2-Cause

Union	Communications	Management
8	6	16

	YES	NO
15. Was there a formal industrial relations set-up?	9	21
21. Could the matter have been settled without the intervention of the Board?	6	24
29. Do the parties have a better understanding of the legal process as a result of their involvement in the dispute?	7	23
30. Would the parties resort to the Board again?	28	2
31. Were the field officer's services of any real value?	14	16
32. Should the field officer have greater powers?	16	14
33. Does the field officer have sufficient training?	21	9
35. Satisfied with Board decision?	19	11
36. Did the parties feel they got a fair hearing?	23	7
40. Did the union become certified?	22	8
41. Did the parties engage in collective bargaining?	20	10
42. Did they reach a settlement?	8	22

UNION

STAGE: Consent to Prosecute

Total - 7

1-Atmosphere	GOOD	FAIR	BAD
	2	1	4
2-Cause	Union	Communications	Management
	2	2	3

		YES	NO
15.	Was there a formal industrial relations set-up?	4	3
21.	Could the matter have been settled without the intervention of the Board?	3	4
29.	Do the parties have a better understanding of the legal process as a result of their involvement in the dispute?	-	7
30.	Would the parties resort to the Board again?	5	2
31.	Were the field officer's services of any real value?	Inapplicable	
32.	Should the field officer have greater powers?	Inapplicable	
33.	Does the field officer have sufficient training?	Inapplicable	
35.	Satisfied with Board decision?	2	3
36.	Did the parties feel they got a fair hearing?	2	3
40.	Did the union become certified?	6	-
41.	Did the parties engage in collective bargaining?	4	2
42.	Did they reach a settlement?	3	3

APPENDIX D

PRATIQUES DELOYALES DU TRAVAIL: ETUDE PRELIMINAIRE SUR L'EFFICACITE DE LA LEGISLATION VISANT LES PRATIQUES DELOYALES DU TRAVAIL AU CANADA

RESUME

PREMIER CHAPITRE: INTRODUCTION ET EXPLICATION

Mandat: Les études - Voici notre mandat: "déterminer l'efficacité de la législation visant les pratiques déloyales du travail au regard du syndicalisme, de la négociation collective et de l'administration des conventions collectives". On nous a demandé de constater dans quelle mesure les lois fédérales et provinciales répondaient au besoin pour lequel elles ont été établies, plutôt que de nous livrer à une étude juridique classique. Il est donc convenu que, sauf pour les nouveautés les plus récentes, la législation est celle exposée par M. le doyen Carrothers dans son ouvrage intitulé Collective Bargaining Law in Canada (1965), au chapitre 10.

Nous nous sommes surtout efforcés de faire une enquête sur ce que les spécialistes pensent de l'efficacité de la législation canadienne visant les pratiques déloyales du travail. Nous avons interrogé des avocats qui s'occupent activement de relations du travail, les présidents et les membres des commissions de relations du travail, des professeurs de droit spécialisés dans ces questions et quelques représentants syndicaux devant les commissions de relations du travail. Nous n'avons pas utilisé de méthode scientifique de sélection. Nous avons choisi nos informateurs en fonction de leur renommée et de leur disponibilité en prenant soin de faire intervenir des intérêts

aussi divers que possibles et d'équilibrer la représentation des travailleurs et du patronat. Si nous admettons que les avocats ont une attitude assez particulière à l'égard de ces rapports sociaux complexes et qu'ils ont souvent, à ce propos, des vues trop étroites, il nous a fallu, étant donné le peu de temps dont nous disposions, travailler avec un groupe défini, et les avocats spécialistes des questions du travail ont certainement une connaissance approfondie du fonctionnement de la législation. En outre, nous avons espéré bénéficier de l'objectivité qui devrait caractériser les bons avocats surtout quand il ont affaire à des confrères. Souvent, surtout chez les hommes de loi les plus qualifiés, nous avons eu la chance de trouver une attitude vraiment objective à l'égard de la législation.

Nous avons directement interrogé nos informateurs sur ce qu'ils pensaient de l'efficacité de la législation visant les pratiques déloyales du travail sous tous ses aspects et de son influence sur la négociation collective aux différents stades de l'organisation et de la reconnaissance syndicales et de la négociation et de l'administration des conventions collectives. Nous avons également demandé qu'on nous présente des faits concernant l'application des lois, l'opinion de juristes sur leur signification, et des propositions de réforme. Le questionnaire utilisé pour guider l'interviewer est reproduit à l'annexe A et le Chapitre II renferme le compte rendu de l'enquête elle-même.

Afin d'avoir un point de comparaison, le professeur Gorsky a effectué aux Etats-Unis une enquête comparable mais moins poussée. Le compte rendu constitue le Chapitre III de ce document. Nous avons aussi fait une étude complémentaire des procédures portant sur une période d'un an, aux termes de l'article 65 du Ontario Labour Relations Act qui prévoit, en cas de

différend, l'enquête administrative et le règlement et, au cas où ce dernier échouerait, l'arbitrage pour les cas de discrimination dans les activités syndicales. Les questions posées lors de cette enquête sont reproduites à l'annexe B et le Chapitre IV renferme le compte rendu de l'enquête elle-même.

Nous avons décidé d'utiliser l'expression "pratiques déloyales du travail" dans un sens large et avons cherché à déterminer l'efficacité de la législation qui existe sur toutes les activités interdites par les lois sur les relations du travail, activités qui autrement ne seraient pas illégales. Cette expression englobe, bien sûr, non seulement l'ingérence de l'employeur dans la formation des syndicats et le choix des agents négociateurs ainsi que l'établissement d'une distinction injuste de la part de l'employeur en raison d'une activité syndicale, mais également la coercition et l'intimidation de la part des syndicats, les grèves et le piquetage illicites. Un tel éventail ne peut être étudié en détail, mais nous nous sommes sérieusement renseignés sur les idées dominantes quant à l'efficacité de la législation dans ce domaine.

Il y aurait lieu de discuter des objectifs de la législation canadienne sur les relations du travail, et plus particulièrement des dispositions visant les pratiques déloyales. Nous avons cherché à connaître les vues de nos informateurs sur cette question et, d'après la diversité des opinions exprimées, nous en avons déduit qu'il suffirait de mentionner que les gouvernements ont eu pour but principal d'assurer la libre négociation collective sans oublier que, dans le contexte canadien, toute mesure qui porte atteinte à la paix industrielle va à l'encontre de l'un des principes fondamentaux de la législation. Voilà donc le critère "d'efficacité" de la législation canadienne visant les pratiques déloyales du travail.

CHAPITRE II: ETUDE DE L'OPINION DES SPECIALISTES

Nous disons dans ce chapitre ce que nous pensons de l'unanimité des spécialistes en ce qui concerne l'efficacité des lois canadiennes portant sur les pratiques déloyales du travail. L'accord est total sur certains points, mais le plus souvent, le groupe des conseillers juridiques patronaux fait l'unanimité d'une part et celui des conseillers juridiques et autres représentants des travailleurs, de l'autre. Les présidents de commissions et les universitaires objectifs se rangent parfois du côté des patrons, parfois ils sont du même avis que les travailleurs et, de temps en temps, ils expriment un tout autre point de vue. Sur un certain nombre de questions, l'opinion dominante diffère sensiblement d'une province à l'autre. Nous mentionnons dans notre rapport ces divers groupes d'opinions, car ils sont peut-être plus significatifs aux yeux de celui qui veut réformer la loi que ne le serait la parfaite unanimité de l'ensemble de nos informateurs.

En général, ceux que nous avons interrogés ne sont pas mécontents de l'application des dispositions de la législation canadienne concernant les pratiques déloyales du travail. Chez les travailleurs, on trouve, en large part ce que l'on pourrait appeler la "résignation à l'inévitable". Par exemple, on pense généralement que les cas de renvoi discriminatoire sont nombreux, mais que les lois ne peuvent pas y changer grand-chose. Les individus non engagés, notamment les présidents des commissions de relations du travail ne s'inquiètent pas beaucoup d'un manque d'efficacité possible et, sauf pour ce qui est des droits individuels, le patronat est d'avis que tout va bien. Ce sont là de simples généralisations et, par contre, à mesure que les questions se faisaient plus précises, cet "état de satisfaction" tendait à disparaître, et il n'existait pas du tout chez ceux qui avaient étudié les

faits de plus près. Il est étonnant de voir le peu de propositions constructives qui ont été avancées, si l'on excepte celles de membres de commissions de relations du travail, des universitaires et d'un tout petit nombre d'avocats hautement spécialisés.

Les tribunaux - De l'avis général, dans les cas appropriés, les conseils d'arbitrage sont les tribunaux les plus acceptables en matière de relations du travail et, si l'on excepte l'exécution de la convention collective, les personnes interrogées sont presque unanimes pour dire que ce sont les commissions de relations du travail qui conviennent le mieux. Un grand nombre de patrons voudraient pourtant limiter la compétence des commissions aux problèmes d'accréditation, surtout dans les provinces Maritimes où les commissions ne siègent qu'à mi-temps. Les opinions sont très divergentes sur la question de savoir si les commissions doivent être tripartites.

Rôle des enquêteurs - Tout le monde est partisan d'une attitude conciliante pour les différends du travail, et les travailleurs, comme le patronat et les non-engagés, sont en général favorable à la procédure établie aux termes de l'article 65 du Ontario Labour Relations Act. En général, des propositions voulant que les enquêteurs aient le pouvoir de rendre des décisions obligatoires, sous réserve du droit d'en appeler aux commissions n'ont pas reçu un accueil favorable.

Injonctions: les tribunaux ou les commissions de relations du travail - L'avis général, mais qui est loin d'être unanime, des non-engagés et des travailleurs est favorable à ce que l'on donne aux commissions de relations du travail toute compétence en ce qui concerne les grèves et le piquetage. Le patronat préfère la laisser aux tribunaux.

Droits privés de poursuite pour dommages causés par la violation de dispositions légales visant les pratiques déloyales du travail - L'opinion générale est que ces droits devraient exister, bien que, du côté du patronat, un grand nombre soit d'avis de restreindre ces droits privés de poursuite aux cas de dommages causés par les grèves illégales.

Les syndicats et la personnalité morale - Pour tous ceux qui ont été interrogés, il faudrait traiter les associations de travailleurs comme des personnes morales dans tous les cas où il s'agit de faire respecter les dispositions légales visant les pratiques déloyales du travail.

Lock-out - De l'avis général, les lock-out sont très rares et, s'ils se produisent, c'est au stade de l'organisation ou pendant la négociation d'une première convention. La solution appropriée généralement favorisée en cas de lock-out illicite est un droit de poursuite pour perte de salaire.

Pratiques déloyales dans les relations entre patrons et travailleurs - Les quatre étapes du processus de la négociation collective, à savoir: l'organisation, la reconnaissance syndicale, la négociation proprement dite et l'administration, sont examinées chacune à leur tour en commençant par les pratiques déloyales propres au patronat, puis en étudiant celles qui sont propres aux syndicats. Pour chaque étape nous faisons référence aux articles pertinents de la Loi sur les relations industrielles et sur les enquêtes visant les différends du travail, S.R.C. 1952, chapitre 152, et aux articles équivalents ou quelque peu différents qui existent dans les lois provinciales; nous estimons ensuite la valeur des avis autorisés obtenus sur l'efficacité des dispositions légales qui s'appliquent à ce stade. Nous donnons finalement une appréciation détaillée de l'état de l'opinion autorisée à l'égard de chacune des pratiques déloyales étudiées. On trouvera ci-dessous un résumé des idées générales les plus significatives.

Le Conseil canadien des relations ouvrières et les commissions qui siègent dans les juridictions où il n'est pas expressément interdit d'intervenir dans le "choix" d'un agent négociateur sont moins sensibles à l'intervention de l'employeur que la Commission de l'Ontario. On a pourtant avancé que cette différence n'a rien à voir avec l'énoncé des lois. La domination des syndicats par l'employeur ne semble plus être un problème majeur et, le cas échéant, la vraie façon d'obvier à cela est le refus d'accréditation plutôt qu'une procédure de recours pour pratique déloyale du travail.

De nombreux représentants du patronat s'inquiètent de la difficulté qu'ils éprouvent à renseigner les travailleurs pendant une campagne d'organisation; pour leur part, les conseillers juridiques du patronat se demandent jusqu'à quel point, selon leur éthique professionnelle, ils peuvent conseiller leurs clients lorsque ces derniers ont à faire face à une campagne d'organisation.

On est d'avis que les lois en vigueur empêchent, dans une grande mesure, les congédiements, la discrimination en matière d'emploi et l'intimidation des travailleurs par des menaces s'ils participent à des activités syndicales; mais, par contre, on admet que la loi est difficile à faire respecter par un employeur rusé et bien informé. Il est presque impossible de faire respecter la loi lorsque l'employeur refuse, par discrimination, d'engager quelqu'un. Au Québec, la disposition de l'article 16 du Code du travail qui crée une présomption en faveur de l'employé est appréciée dans la province, et les travailleurs de même que les personnes non engagées des autres juridictions se réjouiraient de la voir adopter. Une présomption de fait semblable existe devant la Commission des relations du travail de l'Ontario. Il est très net que presque tous s'accordent pour dire qu'une attitude de

compromis est le meilleur moyen de remédier à ce type de pratiques déloyales du travail. L'article 65 de la loi ontarienne en est l'exemple. Voir le Chapitre IV intitulé "Etude complémentaire". L'opinion n'est pas favorable aux poursuites criminelles comme sanctions. L'article 367 du Code criminel en vertu duquel les congédiements pour activités syndicales sont interdits est une déclaration de principe valables à l'échelon national, bien qu'on n'y ait presque jamais recours. L'interdiction faite aux syndicats d'utiliser la coercition et l'intimidation comprend et devrait comprendre, pour un employé qui ne s'inscrit pas à un syndicat, la menace de la perte de son emploi au moment de l'accréditation du syndicat. On n'est pas arrivé à se mettre d'accord, même du côté des travailleurs, pour accorder aux organisateurs des syndicats une plus grande liberté d'accès aux locaux des employeurs. Les dispositions des articles 7, 8 et 9 du Code du travail du Québec sont généralement approuvées pour cette province, mais dans les autres provinces on ne sent pas tellement la nécessité de prendre des mesures comparables.

Les travailleurs sont unanimes à dire que, dès qu'une demande d'accréditation est présentée, il faudrait interdire, comme cela se fait au Québec et dans quelques autres provinces, la modification unilatérale des taux de salaire et des conditions de travail qui tend à saper l'influence du syndicat. Aux termes de la loi fédérale, l'employeur est autorisé à effectuer ces modifications à tout moment jusqu'à ce que, après l'accréditation, l'avis de négociation ait été donné. Le patronat s'y oppose parce que, pendant cette longue période, l'employeur risque de perdre sa place de concurrence en matière de salaires et, de plus, l'obliger à demander l'accord du syndicat pour une modification plus rapide reviendrait à imposer la reconnaissance de facto avant l'accréditation. En Colombie-Britannique, la loi répond à

cette objection en stipulant que l'employeur peut modifier les salaires et les conditions de travail pendant la période en question s'il a l'assentiment de la commission.

De l'avis général, la loi ne pourrait pas faire grand-chose ou, du moins aux yeux du patronat, ne devrait pas faire grand-chose pour garantir la bonne foi dans les négociations. Les travailleurs ont tendance à prendre une attitude cynique. Apparemment, on n'a pas beaucoup réfléchi au problème, mais l'opinion générale est qu'il ne faut pas importer au Canada les normes juridiques subtiles et compliquées en usage aux Etats-Unis pour garantir la bonne foi des négociations. La conciliation obligatoire, plutôt que l'adoption de normes juridiques artificielles, paraît pour beaucoup constituer une solution de rechange.

L'opinion s'accorde sur le principe de l'interdiction légale des grèves de reconnaissance ou des grèves en cours de convention collective, mais l'unanimité ne se fait pas sur la question de savoir si, dans ce domaine, la compétence revient au tribunal ou aux commissions, et les avis sont contraires quand on demande si les pratiques déloyales ou dangereuses de la part de l'employeur et, dans certains cas, l'évolution technologique, devraient justifier les grèves en cours de convention collective. L'opinion présente deux tendances assez surprenantes ayant trait aux mesures à prendre contre les grèves illicites. Premièrement, les deux clans trouvent excellent le pouvoir dont jouit la Commission des relations du travail de l'Ontario qui lui permet de faire une simple déclaration de grève illicite. Deuxièmement, quelques représentants des travailleurs, dignes de tout respect, s'associent au patronat pour souhaiter que la législation contienne des dispositions permettant d'intervenir non seulement le piquetage à l'appui d'une

grève illicite, mais aussi la grève illicite elle-même. La plupart de ceux qui ont été interrogés admettent que l'on puisse interdire le piquetage à l'appui d'une grève illicite, quoique la majorité des travailleurs souhaitent que, dans ce cas, on essaye de faire une distinction entre le piquetage d'information et le piquetage qui sert activement la grève.

En général, les travailleurs et les personnes non engagées, ne sont pas satisfaits de la législation ayant trait aux motifs pour lesquels les injonctions sont accordées. C'est à la procédure d'injonction que les travailleurs s'en prennent le plus. La majorité du patronat est satisfaite tant du droit substantif que de la procédure concernant l'injonction mais une très faible minorité ne l'est pas. Dans tous les groupes, on est tout à fait favorable à une codification de la législation visant les délits dans les différends du travail.

Nos informateurs dans l'ensemble s'interrogent sur la place qu'occupe l'individu dans le régime de la négociation collective. Ce souci est souvent atténué par les valeurs intrinsèques du régime. On s'accorde cependant à penser que l'on devrait imposer aux syndicats l'obligation d'une représentation équitable et qu'il devrait exister des moyens légaux d'assurer que, dans la procédure comme dans le droit substantif, la discipline syndicale soit équitable. Plusieurs personnes interrogées sont d'avis que les syndicats ont dû ou pourraient être amenés à prendre eux-mêmes des dispositions en ce sens.

CHAPITRE III: ETUDE COMPARATIVE DE LA LEGISLATION FEDERALE DU TRAVAIL AUX ETATS-UNIS

En faisant une étude comparative de la législation fédérale du travail aux Etats-Unis, notre objet était de tirer de l'expérience américaine ce qui

pourrait servir à améliorer la législation visant les pratiques déloyales du travail au Canada.

Certaines difficultés auxquelles nous nous sommes heurtés au cours de notre enquête auprès des personnes autorisées au Canada ne sont pas particulières à notre pays puisqu'elles existent aussi aux Etats-Unis. C'est pourquoi nous avons jugé bon d'aller au-delà des frontières étudier un régime qui ressemble assez au nôtre pour que nous puissions en tirer des conclusions utiles. Nous n'avons pas tant cherché à analyser en détail, quant au fond, les dispositions du droit substantif contenues dans les lois fédérales du travail des Etats-Unis,qu'à étudier les développements administratifs. Nous avons centré la recherche sur l'identification de l'autorité compétente dans les questions de:

a) la procédure d'enquête et de poursuite;

b) la procédure d'arbitrage;

c) la procédure d'application.

Les conclusions des rencontres avec le personnel du National Labor Relations Board, avec des avocats et des universitaires spécialistes des questions du travail sont consignées ainsi qu'une analyse du rôle du National Labor Relations Board, de son conseil général (General Counsel), de ses directeurs régionaux, des avocats de cet organisme et des tribunaux fédéraux.

Nous avons décrit la façon dont on exerce des poursuites aux Etats-Unis dans le cas de pratique déloyale du travail, ce que nous avons mis en comparaison avec ce qui se fait au Canada. Nous avons particulièrement insisté sur l'influence que peut exercer l'intervention du gouvernement dans les poursuites engagées devant le National Labor Relations Board par l'intermédiaire du conseil général alors que, au Canada, ce sont des mesures d'un caractère privé que l'on prend généralement.

Nous avons exposé la réaction, souvent peu enthousiaste des avocats canadiens.

Nous avons en outre noté la compétence exclusive et très étendue du National Labor Relations Board pour la comparer aux deux principales autorités compétentes en matière de répression, à savoir: les commissions de relations du travail et les magistrats. Le caractère fondamentalement civil des méthodes de recours en cas de pratiques déloyales du travail aux Etats-Unis a fait l'objet d'un commentaire ainsi que l'opinion, commune chez nos interlocuteurs canadiens ou américains, que l'on statue beaucoup mieux sur un cas de pratique déloyale dans une ambiance autre que celle d'une cour criminelle.

Nous avons donné un aperçu de la compétence très large dont jouit le National Labor Relations Board pour ce qui est de l'obligation de négocier, de l'activité secondaire, et des injonctions et nous avons fait un exposé des observations de nos interlocuteurs canadiens sur les avantages qu'il pourrait y avoir à donner une telle compétence aux commissions canadiennes.

Il a été question de l'intervention des tribunaux dans les affaires internes des syndicats aux termes du Labor Bill of Rights que renferme le Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act). Dans toutes les juridictions, on est de plus en plus conscient de la nécessité, pour les membres d'un syndicat, d'être protégés contre les effets d'une discipline syndicale arbitraire. Les tribunaux ont répondu à ce besoin de façon aussi valable, peu importe qu'ils appuient leur décision sur une loi ou sur le droit commun.

Conclusion

Les Canadiens qui continuent à ne pas vouloir tenir compte de l'expérience américaine le font à leur détriment. Dans les deux systèmes sociaux et juridiques différents, il y a un fond commun d'expérience et une certaine similitude dans les relations patronales-syndicales. Les pratiques déloyales, créées de toute pièce par les lois et relatives à la liberté de participer à toute les activités que comporte le régime de la négociation collective, ont des buts identiques. L'utilisation du droit substantif et de la procédure pour ces buts donne au moins un aperçu utile d'autres moyens, peut-être meilleurs, de protéger les droits institués par la législation du travail.

CHAPITRE IV: ETUDE COMPLEMENTAIRE DES REQUETES PRESENTEES AUX TERMES DE L'ARTICLE 65 DU "ONTARIO LABOUR RELATIONS ACT"

L'article 65 du Ontario Labour Relations Act prévoit, en autres, une procédure qui permet de porter plainte auprès de la Commission des relations du travail alléguant que:

> a) l'on a refusé d'engager, congédié, traité d'une manière discriminatoire, menacé, contraint, intimidé ou traité une personne contrairement aux dispositions de cette loi en ce qui concerne son travail, ses possibilités ou ses conditions d'emploi; (traduction)

Un enquêteur étudie la plainte et cherche à trouver un compromis entre l'employeur et l'employé ou son syndicat. En cas d'échec, la Commission des relations du travail est habilitée, après avoir entendu la requête, à ordonner que la personne soit réintégrée dans ses fonctions et indemnisée. Il semble que ce soit l'attitude la plus énergique envers les pratiques déloyales du travail au Canada.

Nous avons étudié quatre-vingt-trois cas sur lesquels la Commission ontarienne des relations du travail a statué aux termes de l'article 65, de février 1965 à mars 1966. Nous avons interrogé les représentants du patronat et les dirigeants syndicaux directement impliqués dans les poursuites. Dans quarante-neuf cas, notre assistant de recherche a pu interroger des représentants des deux parties, mais dans vingt-trois cas, ceux de la partie syndicale seulement et, dans onze cas, ceux du patronat uniquement.

D'une façon générale, les résultats de cette enquête complémentaire appuient les conclusions que l'on peut tirer du sondage de l'opinion autorisée dont il est fait rapport au Chapitre II. Le Tableau A donne le nombre de cas dans lesquels les parties intéressées ont donné un avis favorable sur le rôle joué, d'abord par l'enquêteur et, ensuite, par la Commission. Dans 52 p. 100 des cas, les représentants des syndicats parlent favorablement du rôle des enquêteurs, et ils appuient l'action de la Commission dans 76 p. 100 des cas. Quant au patronat, il approuve respectivement pour 39 p. 100 et 35 p. 100 des cas, ce qui doit être interprété comme une aversion générale des employeurs pour toute ingérence dans les affaires du travail. Il faut étudier le Tableau A avec le Tableau B qui montre que l'opinion émise pour chaque cas peut dépendre dans une certaine mesure de ce que l'issue de l'affaire a favorisé ou non notre informateur. Les Tableaux C, D, et E sont intéressants à deux points de vue: d'une part, les avis du patronat et des travailleurs sur la question de savoir si l'ambiance était "bonne" ou non dans l'usine avant le recours à l'article 65 diffèrent beaucoup, et d'autre part, il est troublant de voir que, dans la moitié des cas seulement, les syndicats ont finalement obtenu une convention collective avec l'employeur intéressé. Le Tableau F confirme ce fait et présente une analyse.

CHAPITRE V: EFFICACITE DE LA LEGISLATION VISANT LES PRATIQUES DELOYALES: QUELQUES CONSIDERATIONS PERSONNELLES

En premier lieu, nous considérerons les pratiques déloyales de l'employeur au stade de l'organisation. A notre avis, les employeurs qui réagissent contre une campagne d'organisation en déclarant publiquement que les exigences du syndicat les obligeront à fermer, devraient justifier leur énoncé. Par ailleurs, il nous paraît bon de bloquer les salaires et les conditions de travail à partir de la date de la demande d'accréditation, avec possibilité de changement si la commission donne son accord. D'autre part, une procédure de "vote rapide", procédure par laquelle un syndicat pourrait forcer l'élection de représentants pour les négociations avec un taux de représentativité de seulement 30 p. 100, préviendrait bon nombre des conflits qui se produisent pendant la période d'organisation. En cas de congédiements au cours d'une campagne d'organisation, la meilleure solution nous paraît être celle du compromis, dont l'article 65 du Ontario Labour Relations Act est le modèle.

Nous jugeons de l'efficacité de la législation contre les pratiques déloyales de la part de l'employeur dans son application à six types de relations patronales-syndicales, classés selon la puissance relative des parties en présence. Cela fait ressortir la portée variable des interdictions et des mesures correctives visant les pratiques déloyales ainsi que l'importance que prend toujours la puissance relative des parties dans leurs rapports, tant au stade de l'organisation qu'à la table de négociation.

Nous recommandons la revalorisation de la fonction de l'enquêteur et une plus grande clarté dans la jurisprudence des commissions. Le professeur Gorsky prône l'établissement d'une obligation plus rigoureuse et plus

juridique de négocier de bonne foi. Le professeur Christie, lui, ne partage pas ce point de vue mais nous nous accordons pour dire qu'il n'est pas souhaitable de faire respecter la bonne foi dans les négociations en ayant recours à un magistrat. Nous sommes partisans de donner aux commissions de relations du travail et, quand il y a lieu, aux arbitres, la compétence pour tout ce qui concerne les relations du travail, y compris les grèves et le piquetage, exception faite des cas où il s'agit des droits de l'individu contre les prétentions de son syndicat.

NOTES